THE ELEMENTS

OF THE

LAW OF BAILMENTS

AND

COMMON CARRIERS.

By IRVING BROWNE.

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TO CALIPH OMAR.

OMAR, who burned (if thou didst burn)
The Alexandrian tomes,
I would erect to thee an urn
Beneath Sophia's domes.

Would that thy exemplary torch
Might bravely blaze again,
And many manufactories scorch
Of book-inditing men!

Especially I'd have thee choke
Law libraries in sheep,
With fire derived from ancient Coke,
And sink in ashes deep.

Destroy the sheep — don't save my own —
I weary of the cram,
The misplaced diligence I've shown —
But kindly spare my Lamb.

And spare, oh, spare this suppliant book
Against a time of need;
Hide it away in humble nook
To serve for legal seed.

The man who writes but hundred pages
Where thousands went before,
Deserves the thanks of weary sages,
And Omar should adore.

PREFACE.

THE tradition that the Caliph Omar burned the Alexandrian library has probably no historical foundation, but if he did burn it, he undoubtedly burned a great deal of tedious and useless stuff. For some years, and especially since I have become a librarian, there has been stealing over me a feeling that if some modern Omar would burn up all the law books, he would do the world a good service. Their numbers, and especially the repetitions of them, have grown to be an incubus upon the legal profession. Although I have had a guilty hand in editing, compiling and writing more than two hundred of them, I would gladly add them to Omar's pile, on the condition that all others went up in smoke. It is probably true that the legal profession were wiser and abler a century ago, and that causes were better argued and better decided, when there were very few law books, than now when there are fifty thousand, and when the genius that establishes principles yields to the industry that hunts for cases and wins by virtue of the last one.

Although I have taken blame to myself, as above set forth, yet I may honestly claim that in one view I am not entirely blameworthy, for I have tried to do something to reduce the bulk of law books, by compressing the substance of many into a few pages. Of this effort I am not wholly ashamed, and if Omar were in a good-natured mood on his arrival, I should ask him to spare my little manuals on Domestic Relations, Sales, Criminal Law and Parol Evidence, and a number of similar essays by other authors, on the ground that they do not take up too much room either physically or mentally, and leave some play

for thought. These may be regarded as attempts at codification.

The present manual is of this class. Designed primarily for students and instructors, it may possibly appeal to the busy and over-burdened lawyer, who is always in a hurry, and who desires to ascertain the rules and principles rather than to chase the developments of them through all their windings and into all their little recesses. This book contains the meat of more than a score of text-books, and is furnished with citations to the leading and the most recent adjudications, and endeavors to keep pace with the novelties of the branch of the law in questions. It is not intended to supersede, but to accompany and to aid—as a kind of tender to the big and slow hulks which are so slow to arrive because they carry so much weight I believe I have here stated all that it is essential for a lawyer to know—certainly all that it is discreet for a beginner to attempt to acquire—of the matters in discussion. It might easily have been made three times as large, but I have studiously kept in view the possible reappearance of Omar, and kept it small. Contrary to the custom of law writers in their prefaces, I am not aware of any faults in it; if I were I should endeavor to correct them. But I dare say there are faults in it, and if so I shall beg that indulgence which is always due to the writer who has done his best and is not too proud to own his fallibility.

IRVING BROWNE.

BUFFALO, *January* 1, 1896.

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BAILMENTS.

CHAPTER I.

DEFINITIONS.

The word "bailment" is derived from the French *bailler*, meaning to deliver or put into one's hands. Bailment has been variously defined by Blackstone, Jones, Story, Kent, Edwards, Schouler and Redfield. With certain modifications the definition given by the latter may be adopted and thus expressed: A bailment is where personal property is delivered by one person to another to keep, to use, to improve or to repair, and to return when the purpose is accomplished, or to sell or transport and deliver to a third person.[1]

A bailment does not always imply a return of the property, because part of the engagement may be the delivery to some other person, as of goods to be sold and delivered, or to be carried and delivered. And this principle applies to every kind of bailment where the property is destroyed without fault of the bailee, by act of God or of the public enemy, or by inevitable accident,[2] and so where the property is taken away from the bailee by the government or by lawful judicial process.[3]

The person entrusting the property is called the bailor; the person receiving it on such trust, the bailee. The principal distinct classes of professed bailees are agisters,

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[1] Redfield on Carriers and other Bailments, § 617.

[2] Story on Bailments, § 23; Conwell v. Smith, 8 Ind. 530.

[3] Watkins v. Roberts, 28 Ind. 167.

livery-stable keepers, pawn-brokers, stock-brokers, innkeepers, safe-deposit companies, warehousemen, wharfingers, carriers of goods.

A general division of bailment may be made according to the degree of care or diligence exacted from the bailee, as follows:

1. Where the transaction is gratuitous and for the exclusive benefit of one of the parties, as in the case of a naked deposit or the loan of an article, where only ordinary care and diligence are required.

2. Where compensation is made to the bailor, but the transaction is for the benefit of both parties, as in the case of the hiring or the pawning of a chattel, and only ordinary care and diligence are required.

3. Where compensation is made to the bailee, but the transaction is for the benefit of both parties, as in the case of common carriers and innkeepers, and extraordinary care and diligence are required.

Elementary writers have usually divided bailment in five classes, derived from the civil law, as follows:

1. *Deposit* (*depositum*), a delivery of goods to be kept and returned, without any act to be done to them, and without compensation.

2. *Commission* (*mandatum*), a delivery of goods where the bailee undertakes to do some act about or upon them, or simply to transport them, without compensation.

3. *Loan* (*commodatum*), a delivery of goods for use by the bailee, for his accommodation, and to be returned to the owner, without compensation.

4. *Pledge* (*pignori acceptum*), a delivery of goods as security for a debt, to be returned or accounted for on the payment of the debt.

5. *Hiring* (*locatio conductio*), where for compensation goods are delivered either (1) for use by the bailee, *locatio rei*; or (2) for keeping or storage, *locatio custodiæ*; or (3) to have labor or services performed on or about them, *locatio*

operis faciendi; or (4) to be transported, *locatio operis mercium vehendarum.*

It is essential to the character of a bailment that the title to the property should not pass to the bailee. Therefore a sale is not a bailment, even if it is a conditional sale, for by a conditional sale title passes on performance of the condition. This subject is more appropriately treated under SALES.

Bailment or sale.—A distinction must be observed between a bailment and a sale. If the identical thing delivered is to be returned, even in an altered form, it is a bailment; but if the receiver is at liberty to return another thing, either in the same or a different form, or to pay money, at his option, it is a sale, title passes, and the property is at the risk of the receiver. So where grain is delivered to be returned as meal, lumber as boards, leather as shoes, or wool as cloth, it is a bailment, and not a sale.[1] But if by contract or usage the identical thing is not to be returned, but only its equivalent, either in the same form or some other, or paid for in money, at the receiver's option, it is a sale or exchange, title passes on delivery, and the risk is upon the receiver.[2] The same principle obtains in respect to the distinction between a bailment

[1] Foster v. Pettibone, 7 N. Y. 433; 57 Am. Dec. 530, Barker v. Roberts, 8 Greenl. 101; Mansfield v. Converse, 8 Allen, 182; Brown v. Hitchcock, 28 Vt. 452; Woodward v. Semans, 125 Ind. 330; 21 Am. St. Rep. 225; Browne on Sales, p. 2.

[2] Sturm v. Boker, 150 U. S. 312; Ewing v. French, 1 Blackf. 354; Smith v. Clark, 21 Wend. 83; 34 Am. Dec. 215; Norton v. Woodruff, 2 N. Y. 153; Butterfield v. Lathrop, 71 Pa. St. 226; Bailey v. Bensley, 87 Ill. 556; So. Am. Ins. Co. v. Randall, L. R., 3 P. C. A. 101; Mack v. Snell, 140 N. Y. 193; 37 Am. St. Rep. 534; Browne on Sales, p. 3.

In Woodward v. Semans, 125 Ind. 330; 21 Am. St. Rep. 225, the court said: "It is the law of this jurisdiction as well as of many others, that where a warehouseman receives grain on deposit for the owner, to be mingled with other grain in a common receptacle from which sales are made, the warehouseman keeping constantly on hand grain of a like kind and quality for the depositor,

and a debt; as in case of a deposit of money in a bank.[1] A contract to furnish materials to which the other is to add materials and manufacture the whole into a certain form is a contract of bailment and not of sale.[2] Where one receives goods, under an agreement to keep them a certain time, and if he pays for them is to become the owner, but otherwise is to pay for the use of them, this is a bailment.[3]

Bailment or lease or sale.—On the other hand, in recent times such personal property as musical instruments and sewing-machines is frequently transferred upon what is called the "installment plan," under a writing binding the receiver to pay a stated sum at specified times "as rent" for it, providing that after a certain amount is thus paid

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and ready for delivery to him on call, the contract is one of bailment and not of sale. The agreement, in this case, is to yield property in exchange for property, and this is essentially a contract of sale. The appellees were entitled to a designated quantity of flour and bran for each bushel of wheat delivered by them, but they were not entitled to the flour and bran produced from the particular wheat delivered by them to the appellants. There was therefore no undertaking to restore the wheat either in its original form or in an altered form."

In Bretz v. Diehl, 117 Pa. St. 589; 2 Am. St. Rep. 706, the Court said: "The fundamental distinction between a bailment and a sale is that in the former, the subject of the contract, although in an altered form, is to be restored to the owner, whilst in the latter there is no obligation to return the specific article; the party receiving it is at liberty to return some other article of equal value in place of it." In Norton v. Woodruff, 2 N. Y. 153, an agreement by a miller to "take" wheat and "give" flour in return was held a sale. See also Jones v. Kemp, 49 Mich. 9; Foster v. Pettibone, 7 N. Y. 433; 57 Am. Dec. 530; Barker v. Roberts, 8 Greenl. 101; Mansfield v. Converse, 8 Allen, 182; Brown v. Hitchcock, 28 Vt. 452; Slaughter v. Green, 1 Rand. 3; 10 Am. Dec. 488; Ledyard v. Hibbard, 48 Mich. 421; 42 Am. Rep. 474; Cent. Lith., etc., Co. v. Moore, 75 Wis. 170; 17 Am. St. Rep. 186; Irons v. Kentner, 51 Iowa, 88; 33 Am. Rep. 119. See *post*.

[1] Wetherell v. O'Brien, 140 Ill. 146; 33 Am. St. Rep. 221.

[2] Mack v. Snell, 140 N. Y. 193; 37 Am. St. Rep. 534.

[3] Brown v. Billington, 163 Pa. St. 76; 43 Am. St. Rep. 781.

the property shall belong to the receiver, that title shall remain in the owner until payment, and that the owner may reclaim it on default in any payment of the rent. The judicial tendency is to regard these transactions as sales and not as leases or bailments.[1] But if no rent is reserved and the article is to be returned within a certain time or paid for, this is a bailment.[2]

Possession.—Possession of the goods is essential to a bailment. So it has been held that a tow-boat owner is not a bailee of boats in tow.[3]

Contract.—There can be no bailment without a consent or contract. So if a servant, without authority or knowledge of his employer, takes goods into his master's house or store on deposit, the employer is not responsible.[4] But one who finds lost property and takes possession of it, becomes a bailee for the owner.[5] So if a lessee finds a stove on the premises he becomes a bailee of it.[6]

Authority.—A corporation cannot become a bailee outside the authority of its charter. So a bank may not render itself liable for gratuitous and special deposits of money or other valuables, unless authorized by its charter to receive them, or unless such has been its custom.[7] But where a tenant in common of personal property is in exclusive possession, he is a bailee of his co-tenant's share, and is liable to him for a conversion of it.[8]

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[1] Browne on Sales, p. 5; Singer Manuf. Co. v. Cole, 4 Lea. 439; 40 Am. Rep. 20; Loomis v. Bragg, 50 Conn. 228; But see Wheeler & W. M. Co. v. Heil, 115 Pa. St. 487; 2 Am. St. Rep. 575. See *post.*

[2] Dunlap v. Gleason, 16 Mich. 158; 93 Am. Dec. 231.

[3] Wells v. Steam Nav. Co., 2 N. Y. 204; Varble v. Bigley, 14 Bush. 698; 29 Am. Rep. 435.

[4] Lloyd v. West Branch Bank, 15 Penn. St. 172; 53 Am. Dec. 581.

[5] Sheldon v. Sherman, 42 N. Y. 484; 1 Am. Rep. 569.

[6] Burk v. Dempster, 34 Neb. 426.

[7] Lloyd v. West Branch Bank, *supra.*

[8] Tuttle v. Campbell, 74 Mich. 652; 16 Am. St. Rep. 652.

CHAPTER II.

DEPOSIT.

A *deposit* is where a thing is put or left in the keeping of the bailee for an indefinite time, or until the bailor reclaims it, without any use, benefit or compensation to the bailee.

Manner of delivery.—The delivery need not be direct; it is sometimes implied by the bailee's coming into constructive possession in the pursuit of business beneficial to him. Thus a merchant is liable for the loss of a customer's watch and chain, taken off, and at a salesman's suggestion put in a drawer while the customer is trying on clothing, if ordinary care is not exercised toward it, but not if it is stolen.[1] And so where a customer trying on a new cloak removes the old one and lays it on a counter, and the merchant provides no place for it, fails to notify the customer to look out for it, and makes no rules requiring employees to look out for it, he is liable if it is lost.[2] Where a lessee finds a stove on the premises he becomes a naked bailee, and may not put it out-doors exposed to the elements.[3] So the owner of a bath-house, who gives a check to a bather for valuables left for safe-keeping, and, knowing well both the bather and the valuables, delivers the articles to another person on presentation of the check, is liable for their value.[4] A good example of a naked

[1] Woodruff v. Painter, 150 Pa. St. 91; 16 L. R. A. 451; 30 Am. St. Rep. 786.

[2] Bunnell v. Stern, 122 N. Y. 539; 10 L. R. A. 481. Followed in Buttman v. Dennett (N. Y. Com. Pl.), 9 Misc. 462, where wraps and other wearing apparel were temporarily laid off in a restaurant by a customer.

[3] Burk v. Dempster, 34 Neb. 426.

[4] Tombler v. Koelling, 60 Ark. 62.

deposit is found in a case where the owner of an apartment house allowed a tenant to store his trunks in a storeroom on the premises without charge.[1]

Degree of care.—As the bailee receives no compensation, the degree of care exacted from him is in proportion; he is liable only in case of fraud or gross neglect.[2] This is the doctrine of Sir William Jones in his treatise on Bailments, and the early doctrine of Coke that bare acceptance implies an agreement to keep safely and renders the bailee liable for loss by theft is now universally discarded. The leading case in this country, illustrating this principle, was where a chest of gold was deposited in a bank for gratuitous safe-keeping, without any special undertaking, and the gold was fraudulently appropriated by the cashier, it was held that the bank was not liable to the depositor.[3] This

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[1] Davis v. Gay, 141 Mass. 531.

[2] Coggs v. Bernard, 2 Ld. Ram. 913; Turrentine v. W. & W. R. Co., 100 N. C. 375; 6 Am. St. Rep. 602.

[3] Foster v. Essex Bank, 17 Mass. 479; 9 Am. Dec. 168. Parker, C. J., observed: "It must be manifest, that as far as the bank was concerned, this was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank, which can tend to increase its liability beyond the effect of such a contract. No control whatever of the chest, or of the gold contained in it, was left with the bank or its officers. It would have been a breach of trust to have opened the chest or to inspect its contents. The owner could at any time have withdrawn it, there being no lien for any price of its custody, and it was not thought that the bank had authority to remove it to a place of greater safety without the orders of its owner." He also held that the memorandum given by the cashier on receipt of the chest, stating that it was left for safe-keeping, contained no undertaking on the part of the bank beyond that implied from mere delivery without any writing. He held that the cashier's act was not in the course of his employment. He therefore applied the principle that the bailor "shall be the loser, unless the person in whom he confided has shown bad faith in exposing the goods to hazards to which he would not expose his own. This would be *crassa negligentia*, and for this alone is such a depositary liable." "If he locks and fastens the warehouse as other prudent people do, and thieves break through and steal, he ought not to

doctrine was also laid down in a case where the owner of a painting on paper pasted on canvas delivered it to the

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be accountable; but if he leaves the doors or windows open, he ought to be." See Smith v. First Nat. Bank, 99 Mass. 605; 97 Am. Dec. 59; Matter of Franklin Bank, 1 Paige, 249; 19 Am. Dec. 413; Mer. Nat. Bank v. Guilmartin, 88 Ga. 797; 17 L. R. A. 322. In Giblin v. McMullen, L. R. 2 P. C. 318; 3 Eng. Rul. Cas. 618, it was held that bankers who receive securities by way of deposit for safe-custody gratuitously — not making any charge for commission or having any lien on the securities — are not responsible for any higher degree of care than a reasonably prudent man may be expected to take of property of the like description. In that case, securities to bearer contained in a box deposited with a bank by a customer were stolen by the cashier who had access to the strong room. This cashier had long been in the service of the bank and borne a good character. The key of the box was in the custody of the customer, and it did not appear how the cashier had got access to the contents. It was held that there was not evidence to go to a jury of such negligence on the part of the bank as to make them liable. To the report on this case in 3 Eng. Rul. Cas. 625, the author of the present work has appended the following note, which he is permitted to reproduce here:

"The doctrine of the principal case is generally held in this country. The leading case is Foster v. Essex Bank, 17 Mass. 479; 9 Am. Dec. 168 (A. D. 1621), in which the Court pronounced the case to be unprecedented, and it was held that where a cask containing a quantity of gold coin was deposited in a bank for safe-keeping, in accordance with practice, and the gold was fraudulently taken out by the cashier, the bank was not liable therefor to the depositor. This doctrine has also been adjudged in more recent years under the National Banking Act. Scott v. Nat. Bank of Chester, 72 Pa. St. 471; 13 Am. Rep. 711; Nat. Bank v. Ocean Bank, 60 N. Y. 278; 19 Am. Rep. 181; First Nat. Bank v. Graham, 79 Pa. St. 106; 21 Am. Rep. 49; First Nat. Bank v. Rex, 89 Pa. St. 307; 33 Am. Rep. 767; Turner v. First Nat. Bank, 26 Iowa, 562; Chattahooche Nat. Bank v. Schley, 58 Ga. 369; Merchants' Nat. Bank v. Guilmartin, Ga. Sup. Ct., 44 Am. St. Rep. 182; 17 L. R. A. 322. But see to the contrary, Wiley v. First Nat. Bank, 47 Vt. 546; 19 Am. Rep. 122; Whitney v. First Nat. Bank, 55 Vt. 155; 45 Am. Rep. 598.

"In Merch. Nat. Bank v. Guilmartin, *supra*, it was held that the bank was not liable for a special deposit received through the cashier for gratuitous safe-keeping and return to the depositor on demand, although the cashier stole or fraudulently appropriated it to his own use, provided the bank exercised due diligence in the selection and retention of the cashier, and his fraudulent act

defendant without any special agreement as to care and without any agreement as to reward, and the defendant

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was without the knowledge or consent of the other officers. Citing the principal case, and Preston v. Prather, 137 U. S. 604.

"But a bank is liable in such case for gross negligence. Pattison v. Syracuse Nat. Bank, 80 N. Y. 82; 36 Am. Rep. 582; First Nat. Bank v. Graham, 85 Pa. St. 91; 27 Am. Rep. 628, affirmed by the United States Supreme Court, 100 U. S. 699. The Court in the last case observed:

"'Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

"'They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. Merchants' Bank v. State Bank, 10 Wall. 645. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the objects of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel. In certain cases it may be indicted for misfeasance or non-feasance touching duties imposed upon it in which the public are interested. Its offences may be such as will forfeit its existence. P. W. & B. R. Co. v. Quigley, 21 How. 209; 2 Wait Actions and Defences, 337, 338, 339; Angell & Ames on Corp., §§ 186, 385; Cooley on Torts, 119, 120.

"'Recurring to the case in hand, it is now well settled that if a bank be accustomed to take such deposits as the one here in question, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter. Foster v. Essex Bank, 17 Mass. 479; Lancaster Co. Nat. Bank v. Smith, 62 Pa. St. 47; Scott v. National Bank of Chester Valley, 72 id. 471; s. c., 13 Am. Rep. 711; Thomp. N. B. Cas. 864; First Nat. Bank of Carlisle v. Graham, 79 Pa. St. 106; s. c., 21 Am. Rep. 49; Thomp. N. B. Cas. 875; Turner v. First Nat. Bank of Keokuk, 26 Iowa, 562; Thomp. N. B. Cas. 454; Smith v. First Nat. Bank of Westfield, 99 Mass. 605; Chattahooche Nat. Bank v. Schley, 58 Ga. 369; Thomp. N. B. Cas. 379. The only authorities in direct conflict with these adjudications, to which our attention has been called, are Wiley v. Nat. Bank of Vermont, 47 Vt. 546; s. c., 19 Am. Rep. 122; Thomp. N. B. Cas. 905; and Whitney v. Nat. Bank of Brattleboro, 50 Vt. 389; s. c., 28 Am. Rep. 503.

"'The case first cited (Foster v. Essex Bank) was argued exhaustively by the most eminent counsel of the time and decided by a court of great judicial

kept it in a room next a stable in which was a well which

learning and ability. Their opinion is marked by careful elaboration. The special deposit there was a cask containing gold coin. While it was maintained that the bank would have been liable for its loss by gross negligence, it was held that such negligence in that case had not been shown.

"'Here gross negligence is conclusively established. The depositor kept an account in the bank. The cashier cut off and collected the coupons and placed the proceeds to her credit. The bonds therefore entered into the legitimate and proper business of the institution. But it is unnecessary to pursue this view of the subject further, because we think there is another ground free from doubt upon which our judgment may be rested.

"'The 46th section of the Banking Act of 1864, re-enacted in the Revised Statutes of the United States, § 5228, declares that after the failure of a National bank to pay its circulating notes, etc., 'it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep moneys belonging to it, *and to deliver special deposits*.' This implies clearly that a National bank, as a part of its legitimate business, may receive *such 'special deposits,'* and this implication is as effectual as an express declaration of the same thing would have been. United States v. Babbit, 1 Black, 61.

"'The phrase '*special deposits*,' thus used, embraces deposits such as that here in question. Pattison v. Syracuse Nat. Bank, Court of Appeals, New York (recently decided, and not yet reported). In that case it was said, 'a reference to the history of banking discloses that the chief, and in some cases the only deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping and to be specifically returned to the depositor; and such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done.'

"'It would undoubtedly be competent for a National bank to receive a special deposit of such securities as those here in question either on a contract of hiring or without reward, and it would be liable for a greater or less degree of negligence accordingly.'

"'We do not mean that it could convert itself into a pawnbroker's shop. That subject involves topics alien to the case before us, and which in this opinion it is unnecessary to consider.'"

"To the same effect Bank v. Zent, 39 Ohio St. 105; 3 Browne Nat. Bank Cas. 698; Wylie v. Northampton Nat. Bank, 119 U. S. 361; 3 Browne Nat. Bank Cas. 188.

caused the picture to become damp and to peel;[1] and where a boarder requested the boarding-house keeper to deposit his money in his safe, and the safe was feloniously broken and the money stolen;[2] and so where a regular boarder at a hotel deposited money in the landlord's safe and it was stolen by the night clerk without negligence on the landlord's part;[3] and where one received for gratuitous

"Bankers are liable for the theft by their cashier of government bonds held by them as gratuitous bailees, to which such cashier had access, where they failed to look after such bonds, or to discharge him after being notified that he was speculating in stocks, he not being known to have any property other than his salary. Gray v. Merriam, Ill. Sup. Ct. 35 N. E. Rep. 810; affirming 46 Ill. App. 337."

[1] Wythre v. Cock, 2 Strange, 1099.

[2] Jennings v. Reynolds, 4 Kans. 110.

[3] Taylor v. Downey, — Mich. —; 62 N. W. Rep. 716. The Court observed: "There is not a uniformity of decision upon this question of a boarding-house keeper's liability to a boarder. In Regina v. Hartley, 3 El. & Bl. 144, a divided court affirmed the instruction that the boarding-house keeper did not contract to safely keep baggage of a boarder. This was where a servant carelessly left a hall door open, permitting a thief to enter and steal the baggage, which was in the hall. In Holder v. Soulby, 8 C. B. (N. S.) 263, Erle, J., protested against the claim that it was the duty of the keeper of a lodging-house to take care of a lodger's goods, and said that where the proprietor had done nothing which amounts to misfeasance, he knew of no authority or principle upon which he could be held responsible for mere absence of care. In a note to that case it is said that, 'even in a case of a common inn, the innkeeper is not liable as such to persons who reside permanently at his house as boarders, nor otherwise than for actual negligence,' citing Chamberlain v. Masterson, 26 Ala. 371; Manning v. Wells, 9 Humph. 748. In Lawrence v. Howard, 1 Utah, 142, it was held that requiring lodgers to lock their rooms and deposit the key at the office was ordinary diligence. Indeed the court went further, and held that only slight care was required, implying that there was no bailment for mutual benefit in that case. The goods were stolen from the room where the proprietor left them after the plaintiff's departure. The case of Jeffords v. Crump, 12 Phila. 500, holds that 'an innkeeper is not liable for goods of a boarder, stolen from the inn, unless there be proof of gross negligence;' thus implying, as did Lawrence v. Howard, that it was a case of depositum. See also Neal v. Wilcox, 4 Jones (N. C.), 146. The case of Smith

delivery a sealed letter containing money[1] and where a railroad company retained freight on their cars for the owner's accommodation and without any additional compensation;[2] and in a case of a special and gratuitous deposit of notes in a bank;[3] and where one found a bank note and deposited it for gratuitous safe-keeping with defendant, from whose safe it was stolen.[4]

It has sometimes been laid down that a bailee for safe-keeping without reward is bound only to such care of the

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v. Read, 6 Daly, 33, is perhaps as strong a case in support of the plaintiff's contention as any, and this goes no further than to hold that ordinary care is due. See also Cayle's case, 8 Coke, 3; Bac. Abr. 'Inns and Innkeepers,' ch. 5; Vance v. Throckmorton, 5 Bush, 41; Woolen Co. v. Proctor, 7 Cush. 424; Hancock v. Rand, 94 N. Y. 1; Bish. Non-cont. Law, § 1171; Johnson v. Reynolds, 3 Kans. 257; Car Co. v. Lowe (Neb.), 6 Lawy. Rep. Ann. 809, and note, 44 N. W. Rep. 226; Shoecraft v. Bailey, 25 Iowa, 553. It is probable that this is the limit of the rule, viz., that boarding-house keepers are liable as bailees for mutual benefit, for the preservation of goods brought upon the premises by boarders. The nature of the liability is not changed by a deposit in the safe, though the degree of care may be increased over that required where the boarder retains the custody of valuables; but the keeper of the house is still a bailee for mutual benefit, and still owes the duty of ordinary care, which varies in degree as the responsibility is thrown upon him, or is assumed by the owner."

[1] Beardslee v. Richardson, 11 Wend. 25; 25 Am. Dec. 596 (with notes); followed in Haynie v. Waring, 29 Ala. 265; Skelley v. Kahn, 17 Ill. 171; Lampley v. Scott, 24 Miss. 533; Eddy v. Livingston, 35 Mo. 493.

[2] Knowles v. Atlantic, etc., R. Co., 38 Me. 55; 61 Am. Dec. 234.

[3] Lloyd v. West Branch Bank, 15 Pa. St. 172; 53 Am. Dec. 581.

[4] Tancil v. Seaton, 28 Gratt. 601; 26 Am. Rep. 380. To the same effect: Edson v. Weston, 7 Cow. 278; Sodowsky v. McFarland, 3 Dana, 205; Rozelle v. Rhodes, 116 Pa. St. 129; 2 Am. St. Rep. 591; Hibernia Bld'g Ass'n v. McGrath, 154 Pa. St. 296; 35 Am. St. Rep. 828; Coal Co. v. Richter, 31 W. Va. 858; Burk v. Dempster, 34 Neb. 426; Spooner v. Mattoon, 40 Vt. 300; 94 Am. Dec. 395; Minor v. Chic., etc., Ry. Co. 19 Wis. 40; 88 Am. Dec. 670; Dunn v. Branner, 13 La. Ann. 452; Jourdan v. Reed, 1 Clarke, 135; Bronnenburg v. Charman, 80 Ind. 475; Davis v. Gay, 141 Mass. 531.

deposit as he takes of his own property of a similar kind. Thus in one case it is said: "The degree of care which is necessary to avoid the imputation of bad faith is estimated by the carefulness which the depositary uses toward his own property of a similar kind. This is now the received law as to this kind of bailment, notwithstanding it is denied by Lord Coke in 1 Inst. 896. It is recognized in *Coggs* v. *Bernard*, 2 Ld. Raym. 909. And the same law as to gratuitous bailment is mentioned by Sir William Jones, and is sanctioned in *Foster* v. *Essex Bank*."[1] But it is believed that this statement is too broad. Something would depend on the character of the bailee and of the property. His customary gross negligence toward his own property would not justify it toward the deposit, as for example if he was accustomed to keep his money in a stocking instead of a safe or a bank. And much would depend on the nature of the property. He must observe a reasonable degree of care, and in other cases, with reference to the nature of the goods and the particular circumstances of the bailment; as where one sent his horse to another to keep as a mere gratuitous bailee, and he turned the horse after dark, into a dangerous pasture, to which it was unaccustomed, though the place would be perfectly safe to his own cattle, to this animal it would be otherwise, and the bailee would be responsible for any injury in consequence.[2] The degree of care exacted is in proportion to the value of the property to be kept.[3] But it seems that if the bailor knows the general character and habits of the bailee, and the place where and the manner in which the goods are to be kept, he is conclusively presumed to assent that his goods shall be so treated, and cannot maintain an action for loss or injury.[4] Where a

[1] Lloyd v. West Branch Bank, *supra*.

[2] Rooth v. Wilson, 1 B. & Ald. 59.

[3] Conner v. Winton, 8 Ind. 315; 65 Am. Dec. 761.

[4] Knowles v. Atlanlic, etc, R. Co., 38 Me. 55; 61 Am Dec. 234.

bailee is not in the business of a depositary there is no presumption that he was to receive compensation, and thus be bound to higher degree of care, as in case of a boot and shoe dealer receiving a deposit of a quantity of gold.[1]

Use of the property.—The bailee however may render himself liable for loss or injury if he uses the property, contrary to the implied agreement, or he may render himself liable as for a conversion. Thus where a bag of jewels was lodged in the hands of a goldsmith for safe-keeping, and he broke the seal and pawned them for borrowed money, he became responsible as for a conversion, and the pawnee was liable in trover.[2] This principle however is limited to a use for the benefit of the bailee, and does not extend to a use for the benefit of the property, which indeed he is sometimes bound to make, as for example, to exercise a horse, or milk a cow;[3] and so if the use would not injure or endanger the property; for example, he may justifiably read a book so deposited. But if the use subjects the property to risk of loss or injury, like the wearing of jewels, he is liable for loss or injury therein. The use however must have that natural tendency in order to render him liable. So where S., a guest of N., deposited with him for safe-keeping government bonds of the value of $4,500, and N. with the consent of S. put them in a box with his own valuables, which he locked and placed in a drawer in a bureau in his bedroom, which drawer he also locked; and afterwards N. without the consent or knowledge of S., took one of the bonds and pledged it as security for his own debt; and thereafter a thief entered the house, broke both locks and stole the other bonds and N.'s papers, it was held that N. was not liable to S. for the

[1] Mariner v. Smith, 5 Heisk. 203.

[2] Hartop v. Hoare, 2 Strange, 1187.

[3] De Fonclear v. Shottenkirk, 3 Johns. 170.

bonds taken by the thief;[1] the conversion of the one not working a conversion of the others. So when plaintiff deposited with a merchant a sum of money for gratuitous safe-keeping, with permission to use it, of which he never availed himself, but his bookkeeper with the acquiscence of both parties, occasionally took small amounts from it temporarily to make change, and the deposit was kept separate, and stolen without the defendant's fault, he was held not to be liable.[2] So where the bailee appropriated part of a pipe of wine entrusted to him, this was held not to be a conversion of the remainder.[3]

But where the deposit is liquor, and the bailee takes part of it and fills the vessel with water, this is a conversion of the whole.[4]

Servants.—The bailee without reward is responsible for the gross negligence of his servants in keeping the deposit to the same degree as for his own, provided it is within the course or line of his employment, but if the servant steps out of his way to do a wrong, either fraudulently or feloniously, the master is not answerable,[5] unless the master's gross negligence affords the opportunity.

Special undertaking.—If the bailee without reward specially agrees to keep safely, he is bound to a higher degree of care. It was early held that such an undertaking would render him liable for loss by robbery.[6] But to render him thus liable there must be a distinct under-

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[1] Schermer v. Neurath, 54 Md. 491; 39 Am. Rep. 397.

[2] Caldwell v. Hall, 60 Miss. 330; 45 Am. Rep. 410.

[3] Philpott v. Kelley, 3 Ad. & Ell. 106.

[4] Richardson v. Atkinson, 1 Str. 576.

[5] Foster v. Essex Bank, *supra*. But a bailee without a lien is liable for bailment of money taken out of his safe by a clerk whom he allowed to enter the safe. Glover v. Burbidge, 27 S. C. 305.

[6] Kettle v. Bromsall, Willes, 119; but in the report of the case in 3 Petersdorff, 363, it was added, "But in ordinary cases he is not liable if robbed."

taking to keep safely; mere loose talk on the mere understanding of the bailor would not effect it.[1]

Re-delivery.—The bailee without reward is bound to restore the deposit on demand if he still has it. A refusal renders him liable as for conversion or in assumpsit.[2] If the deposit is made by more than one it may not be re-delivered except on the joint demand;[3] but if the deposit is made by one of several owners, re-delivery may be made to that one;[4] and in the former case the one to whom re-delivery was made could not join the others in a suit for the property.[4] The bailee may justify surrender to the true owner, as in case of stolen property,[5] or to the superior force of a judicial decree or proceedings.[6] He should notify the bailor of the proceedings. He is not bound to litigate but is scarcely safe in surrendering on demand.[7] But he is otherwise responsible for a mis-delivery.[8] If he does anything with the property not

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[1] Foster v. Essex Bank, *supra*, where it was held that the cashier's receipt "for safe-keeping" did not imply an agreement to keep safely. "It contains no promise, and assumes no risks other than would be derived from the mere delivery without any writing." It was also held that the weighing of the gold in presence of the president and cashier did not imply any special undertaking to keep safely.

[2] Bradley v. Spofford, 23 N. H. 444; 55 Am. Dec. 205; Wellington v. Wentworth, 8 Metc. 548; Collins v. Bennett, 46 N. Y. 490; Foster v. Essex Bank, *supra*.

[3] May v. Harvey, 13 East, 197.

[4] Brandon v. Scott, 7 Ell. & Bl. 234.

[5] Rogers v. Weir, 34 N. Y. 463.

[6] Bliven v. Hudson R. R. Co., 36 N. Y. 403; Burton v. Wilkinson, 18 Vt. 186; 46 Am. Dec. 145.

[7] Welles v. Thornton, 45 Barb. 390.

[8] Coffin v. Henshaw, 10 Ind. 277; Nelson v. King, 25 Tex. 655; Colyar v. Taylor, 1 Cold. 372. So he delivers at his peril to an apparent stranger, without attempt to verify his claim and without inquiry as to the real ownership. Wear v. Gleason, 52 Ark. 364; 20 Am. St. Rep. 186. And so if he delivers upon a forged order. Hubbell v. Blandy, 87 Mich. 209; 24 Am. St.

agreed upon he is liable as for conversion,[1] and so he is liable for loss by a delivery in a way not requested nor contemplated.[2] The burden is on the bailee to justify his delivery, or excuse a loss or injury.[3]

Actions.—The bailee may recover the deposit from one who has unlawfully taken it from him.[3] An action by the bailor for the deposit must be brought without unreasonable delay.[4]

Expenses in keeping.—In an emergency the bailee without reward may incur expenses on behalf of the owner in the preservation of the property.[5]

Determination.—The bailee may terminate the bailment at any time by tendering the property.[6] Although it has been said that the bailee may not deny his bailor's title, yet he may surrender to the true owner.[7]

Rep. 154. And so if ordered to deliver in one manner he adopts another. Graves v. Smith, 14 Wis. 5; 80 Am. Dec. 762.

[1] Ouderkirk v. Cent. Nat. Bank, 119 N. Y. 263. So if being instructed not to deliver except upon the bailor's written order he delivers to his wife upon a forged order. Kowing v. Manley, 49 N. Y. 192; 10 Am. Rep. 346.

[2] Jenkins v. Bacon, 111 Mass. 373; 15 Am. Rep. 33, where plaintiff, about to start on a long voyage, requested defendant to buy a government bond and keep it for him and collect the coupons. Defendant was to receive no reward. He bought the bond, kept it a year, and then without request sent it by mail to plaintiff's wife, and it was lost. *Held*, that he was liable, irrespective of the question of negligence. So where defendant received money for keeping without reward, and without instructions to remit he intrusted it to one "reputed to be an honest man" for delivery, and it was lost, defendant was held liable. Stewart v. Frazier, 5 Ala. 114. See Skelley v. Kahn, 17 Ill. 170.

[3] Fisher v. Cobb, 6 Vt. 622; Miller v. Adsit, 16 Wend. 335; White v. Webb, 15 Conn. 302; Sutton v. Buck, 2 Taunt. 302.

[4] Wright v. Paine, 62 Ala. 340; 34 Am. Rep. 24.

[5] Harter v. Blanchard, 64 Barb. 617.

[6] Roulston v. McClelland, 2 E. D. Smith, 60.

[7] West. Trans. Co. v. Barber, 56 N. Y. 544; Cook v. Holt, 48 id. 275.

CHAPTER III.

MANDATE OR COMMISSION.

Mandate or commission is where the bailee undertakes, without reward to do something upon or about the thing entrusted to him, as for example where an article to be repaired or transported, without compensation. So one who undertakes gratuitously to carry casks of brandy from one cellar to another, or to collect a note delivered to him, or to doctor a horse entrusted to him, is a mandatory, and assumes a certain degree of responsibility, proportioned to the nature of the property and the character of the services.[1] This branch of the law is always connected with the delivery of property to the mandatory, and is distinguishable from a class of cases in which no property is delivered and the agent is simply to do some act gratuitously, as to effect insurance, collect a demand, or treat a wound. But the mandatory is not bound to act, and no action lies against him for breach of his promise to act.[2]

Degree of care and extent of responsibility.—In such cases is only bound to reasonable diligence and answerable for gross negligence.[3] But his diligence or negligence is measured by the circumstances and the character of the property or of thing service required.[4] So one would

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[1] Coggs v. Bernard, *supra;* Whitney v. Lee, 8 Metc. 91; Conner v. Winton, 8 Ind. 315; 65 Am. Dec. 761; Newell v. Newell, 34 Miss. 385.

[2] Coggs v. Bernard, *supra;* Thorne v. Deas, 4 Johns. 84.

[3] Stanton v. Bell, 2 Hawks, 145; 11 Am. Dec. 744; Conner v. Winton, *supra;* Eddy v. Livingston, 35 Mo. 487; 88 Am. Dec. 122; Haynie v. Waring, 29 Ala. 265; Skelley v. Kahn, 17 Ill. 171; Lampley v. Scott, 24 Miss. 533; Hibernia B Ass'n v. McGrath, 154 Pa. St. 296; 35 Am. St. Rep. 828.

[4] Jenkins v. Motlow, 1 Sneed, 248; 60 Am. Dec. 154; Eddy v. Livingston, *supra;* McNabb v. Lockhart, 18 Ga. 495; Graves v. Ticknor, 6 N. H. 537.

be bound to a greater degree of care in a bailment of money or of fragile goods than in the case of less valuable or less perishable property.[1]

Ordinarily it is considered that the bailee is bound only to such care of or diligence concerning the property entrusted to him as he takes or exercises toward his own of the same kind. So when a merchant undertook to enter a parcel of goods for another with one of his own at a custom-house for exportation, and entered them under a wrong denomination, whereby both were seized, he was held not liable.[1] And so if the bailee does work on the thing bailed with the same care as on his own.[2]

But if his profession implies skill the want of skill may be imputable as gross negligence.[3] And if he is grossly careless in his care of his own valuable property, like money, and his own is likewise lost, this will not excuse such carelessness toward the money entrusted to him.[4] As where one undertook gratuitously to carry money from Boston to New York by boat, and left it with his own in his valise in one cabin while he slept in another, notwithstanding the steward told him it would be safer in the office, and it was stolen, he was held liable for the loss.[1] Especially would he be deemed responsible if the money entrusted was lost but his own was saved, for this would indicate that he took less care of the former than of the latter.[5] But if he conducts the transmission of money as prudent men ordinarily do, he is not responsible for its loss.[6] Where one received for gratuitous delivery a

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[1] Shiells v. Blackburne, 1 H. Bl. 158.

[2] Lane v. Cotton, 1 Ld. Raym. 646; Kettle v. Bromsall, Willes, 121.

[3] Conner v. Winton, *supra* (farrier); Stanton v. Bell, *supra*; Wilson v. Brett, 11 M. & W. 113; Isham v. Post, 141 N. Y. 100; 38 Am. St. Rep. 766 (stock broker); 23 L. R. A. 90.

[4] Tracy v. Wood, 3 Mason, 132; Doorman v. Jenkins, 2 Ad. & Ell. 256.

[5] Bland v. Womack, 2 Murphy, 373.

[6] Jameson v. Livingston, 35 Mo. 487.

sealed letter containing money, which was never delivered, there being no proof of his opening the letter, he was held not liable.[1] One who receives money to be put out on loan, without reward, must ascertain the responsibility of the borrower, take security, and collect at maturity.[2]

Intermeddling.—But if the bailee improperly intermeddles with the goods he may render himself liable for loss. As where a captain of a vessel took charge of a cask of coin and in the course of the voyage opened it to see if it contained contraband, and afterward took care of it as of his own goods, but it was missing at the end of the voyage, he was held liable.[3]

Delivery.—If the mandatory delivers the property to an apparent stranger, without effort to verify his claim or inquiry as to the ownership, he is liable to the owner.[4]

Burden of proof.—After demand and refusal the burden of proof is on the bailee.[5]

Compensation is not presumed, and so where a note is entrusted for collection, and the bailee suffers the statute of limitation to run against it, the burden is on the plaintiff to show his liability.[6]

Determination.—This species of bailment is terminable, like a mere deposit, by consent, by separate action of the parties, by death of either, insanity, marriage, guardianship or bankruptcy.[7]

In other respects, the law of mandates or commissions is similar to that of deposits.

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[1] Beardslee v. Richardson, 11 Wend. 25; 25 Am. Dec. 596.

[2] Samonset v. Mesnager (Cal.), 41 Pac. Rep. 337.

[3] Nelson v. Macintosh, 1 Stark. 237.

[4] Wear v. Gleason, 52 Ark. 364; 20 Am. St. Rep. 186.

[5] Beardslee v. Richardson, *supra*.

[6] Kincheloe v. Priest, 89 Mo. 240; 58 Am. Rep. 117.

[7] Smith v. Field, 5 T. R. 211; Orser v. Storms, 9 Cow. 687, 18 Am. Dec. 543; Wadsworth v. Sharpsteen, 8 N. Y. 388; Hodges v. Hurd, 47 Ill. 363.

CHAPTER IV.

LOAN.

A *loan* is a delivery of goods for use by the bailee, and to be returned to the owner, without compensation.

Degree of care.—The borrower of goods is responsible for injury or loss if it was occasioned by his neglect, or if he used the goods in a manner not warranted, or failed to return them at the appointed time. The main difference between this species of bailment and deposits and mandates, is in the degree of care exacted from the bailee. Inasmuch as he is supposed to derive a benefit from the loan, while the lender derives none, he is held to a higher degree of care than bailee's who derive no benefit. · He "is bound to the strictest care and diligence;" the "utmost care;" "extraordinary care."[1] The rule of extraordinary care is generally followed, and it is considered that the borrower is bound to exercise all the care and diligence that the most careful persons are accustomed to apply to their own affairs, and the omission of the most exact and scrupulous caution is culpable.[2]

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[1] Coggs v. Bernard, *supra;* Bracton; Jones on Bailment, 64; Green v. Hollingsworth, 5 Dana, 173; 30 Am. Dec. 680; Hagebush v. Ragland, 78 Ill. 40; Wood v. McClure, 7 Ind. 155.

[2] Scranton v. Baxter, 4 Sandf. 5; Moore v. Westervelt, 27 N. Y. 243; Esmay v. Fanning, 9 Barb. 176 (carriage borrowed in June and returned in December to the same stable, but after the stable keeper had ceased to be the agent of the owner); Phillips v. Coudon, 14 Ill. 84; Howard v. Babcock, 21 Ill. 259; Wood v. McClure, 7 Ind. 155; Eastman v. Sanborn, 3 Allen, 594 (improperly feeding and watering a borrowed horse, which after return was put by owner into care of a veterinary surgeon whose unskillful treatment contributed to its death, but borrower was held liable therefor); Carpenter v. Branch, 13 Vt. 161; 37 Am. Dec. 587; Bennett v. O'Brien, 37 Ill. 250 (domestic animals borrowed for use).

If one borrows a horse to drive to a specified place and drives to another, he is liable for any injury even by inevitable accident.[1] But if the horse is stolen without his negligence, in such case, or in case of a detention longer than the agreed time, the bailee is not responsible.[2] But otherwise if he is negligent; and so an agricultural society, inviting persons to lend articles for exhibition at a fair, and promising to take care of them, if they are stolen by reason of its negligence, is liable.[3]

Burden of proof—The degree of care is proportioned to the nature of the property, but negligence is not inferable from that alone; it must be made affirmatively to appear.

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[1] Wheelock v. Wheelwright, 5 Mass. 104; Grant v. Ludlow's Adm'r, 8 Ohio St. 48; Kemp v. Farlow, 5 Ind. 462.

[2] Coggs v. Bernard, *supra*; Wood v. McClure, 7 Ind. 155.

[3] Vigo Agr. Soc. v. Brumfiel, 102 Ind. 146; 52 Am. Rep. 657. So in the case of coins lent to a museum for exhibition, and stolen therefrom; and even if the borrower notifies the lender that he would not be responsible for their safety in any manner, he is still liable for gross negligence. Smith v. Library Board (Minn.), 25 L. R. A. 280. In a recent instructive case in Alabama, Prince v. Alabama State Fair; 28 L. R. A. ——, it was held: (1) A legal consideration for the loan of a painting for a competitive exhibition at a fair is furnished in the detriment and inconvenience to which the sender is subjected and the indirect and contingent benefit to the person conducting the exhibition. (2) A general proposal to all persons having articles deemed worthy of exhibition to intrust them to a corporation for a competitive exhibition at a fair, with a promise of redelivery when the exhibition is closed, becomes a special contract with each person sending articles for exhibition when they are received and accepted. (3) The essential elements and characteristics of a lucrative as distinguished from a mere gratuitous bailment exist in the case of the loan of a painting for a competitive exhibition at a fair. (4) A lack of proper care which will create a liability for the loss of a painting on the part of a corporation to which it has been loaned for a competitive exhibition at a fair, is shown, where, after the close of the fair and the withdrawal of policemen, the duty of repacking and reshipping it is intrusted to an agent or officer who is not informed that the painting has been exhibited or in possession of the corporation, and servants are employed to aid him who are unknown to him and of whose skill or integrity there is no evidence.

So negligence is not attributable to the wearing of a borrowed watch while the borrower was hunting,[1] and where the owner of a flag lent it to his employer and helped him hoist it on his building and left it flying when he went away, and it was injured by a hailstorm, negligence was not inferred.[2]

Disputing title.—The bailee may not set up title in himself until restoration to the lender.[3] Nor claim it on behalf of his wife.[4]

Surrender or loss.—If the thing lent is taken away from the borrower by an irresistible force he is not liable; as where a borrowed horse was taken away by United States cavalry; and so in case of theft without negligence.[5] And so in case of destruction by accident without his fault. But if his neglect contributes to the loss he is liable like a common carrier.[6] And so if he brings the property under the operation of an act of God or fails to remove it from exposure thereto.[7] In like manner, he is not liable for loss or injury by a riot or by fire[8] without his negligence.

Actions.—The lender may without demand maintain an action for recovery of the loan on the expiration of the stipulated time,[9] but where it is subject to call, there must

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[1] Green v. Hollingsworth, *supra*.

[2] Beller v. Schultz, 44 Mich. 529; 38 Am. Rep. 281.

[3] Simpson v. Wrenn, 50 Ill. 222; 99 Am. Dec. 511; Maxwell v. Houston, 67 N. C. 305.

[4] Pulliam v. Burlingame, 81 Mo. 111; 51 Am. Rep. 229.

[5] Watkins v. Roberts, 28 Ind. 167; Abraham v. Nunn, 42 Ala. 51; Field v. Brackett, 56 Me. 121; Cumins v. Wood, 44 Ill. 416.

[6] Colt v. McMechen, 6 Johns. 160; 5 Am. Dec. 200.

[7] Read v. Spaulding, 30 N. Y. 630; Davis v. Garrett, 6 Bing.716; Bowman v. Teall, 23 Wend. 306; 35 Am. Dec. 562.

[8] Hyland v. Paul, 33 Barb. 241.

[9] Clapp v. Nelson, 12 Tex. 370; 62 Am. Dec. 530.

be a prior demand.[1] He may maintain trespass against a third party who takes the goods from the bailee, even by legal process.[2] The borrower may maintain an action for the recovery of the article lent, against one who takes it away from him,[3] but cannot maintain an action for its destruction, as where it was in a carrier's charge for transportation.[4] Probably if the bailee should lend the goods to another, he would not only be liable for injury or loss in that borrower's hands, but to an action by the owner for conversion.

Return.—Generally the identical article must be returned, but in the absence of special characteristics, equivalents will answer. So when stocks are lent, the return of an equal number of shares of the stocks of the same company discharges the borrower, without regard to its market value.[5]

Determination.—This species of bailment is determinable in the same ways as deposits and mandates, and also by the lender's sale or assignment of the property to another.[6]

Selling the property.—The borrower can confer no title on one who in good faith purchased the property from him, as where one obtained diamonds from a dealer under the pretense that he had a customer and would return them or the price in an hour, but sold them and decamped with the money.[7]

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[1] Payne v. Gardiner, 29 N. Y. 146.

[2] Root v. Chandler, 10 Wend. 110; 25 Am. Dec. 546.

[3] Little v. Fossett, 34 Me. 545; 56 Am. Dec. 671.

[4] Lockhart v. Western & A. Railroad, 73 Ga. 492; 54 Am. Rep. 883.

[5] Fosdick v. Greene, 27 Ohio St. 484; 22 Am. Rep. 328.

[6] Collins v. Lofftus, 10 Leigh, 5; 34 Am. Dec. 719.

[7] Baehr v. Clark, 83 Iowa, 313; 13 L. R. A. 717; and so where a diamond broker, procuring diamonds from larger dealers to sell to his customers, procured from plaintiffs, dealers in diamonds, some diamonds, giving a receipt stating that they were received by him "on approval," to show to a customer, and "to

Lender's liability.—The lender of an article is responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing directly to which the borrower is injured; but not otherwise. If he notifies the borrower of the defect or vice he is not liable.[1] This is one of the most remarkable developments of the common law.

Presumption.—Where one receives and uses valuable personal property of another for a considerable length of time, with the owner's consent, a contract of hiring and not a gratuitous loan is *prima facie* presumed.[2]

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be returned" to plaintiff "on demand," a purchaser of them in good faith from the broker got no title, although he had previously bought diamonds from him obtained by him from the plaintiffs in the same way. Smith v. Clews, 114 N. Y. 190; 11 Am. St. Rep. 627; in effect reversing same case, 105 N. Y. 283; 59 Am. Rep. 502.

[1] MacCarthy v. Young, 6 H. & N. 329 (scaffold); Blakemore v. Bristol, etc., Ry. Co. 8 El. & Bl. 1035 (crane).

[2] Rider v. Union Rubber Co. 28 N. Y. 379; Cullen v. Lord, 39 Iowa, 302.

CHAPTER V.

PLEDGE.

Thus far have been considered only those bailments which are beneficial to but one of the parties. Deposit and Mandate, beneficial only to the bailor; Loans, beneficial only to the bailee. Bailments mutually beneficial are now to be considered, and first among them is Pledge or Pawn, which consists of a delivery of personal property by debtor to creditor to be kept by him as security until the debt is paid, and then returned, or if not paid, to be realized and applied by virtue of legal proceedings, or upon notice. This is mutually benefical because it procures indulgence to the bailor and security to the bailee.

Who may make.—Only the owner may make the pledge. A factor cannot; and if the pledgee knows the pledgor is merely an agent he cannot hold it for the agent's debt.[1]

How effected.—The pledge is effected by mere delivery.[2] Delivery is essential if practicable.[3] But manual delivery

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[1] Jarvis v. Rogers, 15 Mass. 389; Talmage v. Third Nat. Bank, 91 N. Y. 531.

[2] McLean v. Walker, 10 Johns. 472.

[3] Fletcher v. Howard, 2 Aikens, 115; 16 Am. Dec. 686; First Nat. Bk. v. Nelson, 38 Ga. 391; 95 Am. Dec. 400. The delivery may be to the pledgor's clerk or agent, or to any other third person, if the creditor assents. Sumner v. Hamlet, 12 Pick. 76; Jacquet v. His Creditors, 38 La. Ann. 863; Combs v. Tuchelt, 24 Minn. 423; Boynton v. Payrow, 67 Me. 587; but see Dirigo Tool Co. v. Woodruff, 41 N. J. Eq. 336. Actual possession must be given in such case. Casey v. Cavaroc, 96 U. S. 467. Hence no pledge is accomplished by the debtor executing his note in favor of his creditor; ttaching bonds and certificates of stock to secure its payment; placing note and securities, in a package marked with the creditor's name, in the box of the debtor, in bank; the debtor at the same time instructing his clerk having the key of the bank box to deliver the package on the request of the creditor, and although the instructions are

is not always essential; constructive or symbolical delivery sometimes suffices. In case delivery is impracticable, as in the case of logs in a boom, words and pointing out will suffice.[1] Assignment or delivery of a bill of lading will effect the pledge[2] and so of delivery of a bank book[3] or a warehouse receipt. Delivery may be made to a third person for the pledgee.[4]

Title.—Title does not pass, but only a special property.[5]

What may be pledged.—Every species of personalty may be pledged, including not only chattels, but stocks, mortgages, leases, insurance policies, negotiable instruments, coupon bonds.[6] But not a pension certificate.[7]

For what.—Pledge may be made not only for an existing debt, but for a future debt, as by further advances or

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communicated to the creditor, and all is done in pursuance of a pledge promised the creditor, but no delivery ever having been made, and when the debtor dies, the securities remaining in his bank box, deposited and held as his property. Re Succession of Lanaux, 46 La. Ann. 1036; 25 L. R. A. 577.

[1] Jewett v. Warren, 12 Mass. 300; 7 Am. Dec. 74. The English doctrine which in the case of a pledge by a symbolical delivery requires an attornment by the warehouseman or other custodian of the goods, does not prevail in this country. Conrad v. Fisher, 37 Mo. App. 352; 8 L. R. A. 147.

[2] Dows v. Nat. Ex. Bank, 91 N. Y. 618; Cartwright v. Wilmerding, 24 N. Y. 521; Badlam v. Tucker, 1 Pick. 389.

[3] Boynton v. Payrow, 67 Me. 587; Conrad v. Fisher, 37 Mo. App. 352; 8 L. R. A. 147.

[4] Brown v. Warren, 43 N. H. 430; Sumner v. Hamlet, 12 Pick. 76.

[5] Lucketts v. Townsend, 3 Texas, 119; 49 Am. Dec. 723; Garlick v. James, 12 Johns. 146; 7 Am. Dec. 294.

[6] Wells v. Archer, 10 S. & R. 412; 13 Am. Dec. 682; White Mt., etc., R. v. Bay State Iron Co., 50 N. H. 57; Wilson v. Little, 2 N. Y. 443; 51 Am. Dec. 307; Dewey v. Bowman; 8 Cal. 145; Fennell v. McGowan, 58 Miss. 261; Jerome v. McCarter, 94 U. S. 734; Strong v. Nat. Bk. Ass'n, 45 N. Y. 718; Morris Canal, etc., Co. v. Fisher, 1 Stockt. 667; 64 Am. Dec. 423.

[7] Moffatt v. Van Doren, 4 Bosw. 609.

one to come into existence.[1] But a pledge for a specific debt may not be held for any other, whether in existence at the time of the pledge or afterward accruing, except by express agreement.[2] The relation of broker and customer, under the ordinary contract for a speculative purchase of stock, is that of pledgor and pledgee.[3]

Degree of care.—The pledgee is bound to exercise ordinary care and is liable for extraordinary negligence.[4] If the pledge is lost the pledgee cannot recover the debt without exonerating himself from the imputation of negligence.[5] Any detriment happening to the pledged property through the pledgee's extraordinary negligence may be set off against the debt.[6]

Pledgee's use of property.—The pledgee may use the property, if he does not injure it, but is liable for any injury to it in the use.[7] If the property is of such a character

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[1] Merchants' Bank v. Hall, 83 N. Y. 338; Conard v. Atlantic Ins. Co., 1 Pet. 448; Smithurst v. Edmunds, 14 N. J. Eq. 408.

[2] Jarvis v. Rogers, 15 Mass. 389; James' Appeal, 89 Pa. St. 54; Duncan v. Brennan, 83 N. Y. 487; Bank of Metropolis v. N. E. Bank, 1 How. 234.

[3] Baker v. Drake, 66 N. Y. 518; 23 Am. Rep. 80; Cashman v. Root, 89 Cal. 373; 23 Am. St. Rep. 482. See note, 75 Am. Dec. 313.

[4] Commercial Bank v. Martin, 1 La. Ann. 344; 45 Am. Dec. 87; Petty v. Overall, 42 Ala. 145; 94 Am. Dec. 634; Cooper v. Simpson, 41 Minn. 46; 16 Am. St. Rep. 667; 4 L. R. A. 194; Rumsey v. Laidley, 34 W. Va. 721; 26 Am. St. Rep. 935; Goodwin v. Mass., etc., Co., 152 Mass. 189. It seems that the loss of the article by theft does not raise a presumption of negligence on the part of the pledgee. Petty v. Overall, *supra;* Third Nat. Bank v. Boyd, 44 Md. 47; 22 Am. Rep. 35; Scott v. Crews, 2 S. C. 522.

[5] Crocker v. Monrose, 18 La. 553; 36 Am. Dec. 660.

[6] Stearns v. Marsh, 4 Denio, 227; 47 Am. Dec. 248.

[7] Thompson v. Patrick, 4 Watts, 414; Lawrence v. Maxwell, 53 N. Y. 19; where the court observe: "Ordinarily, and in the absence of any agreement or assent by the pledgor, the pledgee would have no right to use the thing pledged, and a use of it would be illegal. But under special circumstances, depending somewhat upon the nature of the pledge, and in all cases with the assent of the pledgor, express or implied, the property pledged may be used by

that use is necessary to its preservation he *must* use it; and if the keeping is a charge on him (as in case of animals) he may use it and avail himself of the *profits* of the use as a recompense for *the expense of keeping;* if the use would be beneficial to the property or will not injure it, he may use it; but if use although without necessary injury would subject it to extraordinary perils, he may not use it. So he must exercise a horse, and must milk a cow, and he may sell the milk for his own profit, and he may read a book, when these things are the subject of pledge.[1]

Pledgee's right to possession.—The pledgee has the right of possession as against the pledgor and all the world, except the true owner who has not consented to the pledge. He may maintain an action against the pledgor for wrongfully retaining or obtaining the thing pledged,[2]

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the pledgee in any way consistent with the general ownership, and the ultimate rights of the pledgor." And it was held that proof of a custom among stock brokers to hypothecate pledged stocks was inadmissible.

[1] These are the views of Sir Wm. Jones; Judge Redfield thinks that any *profits* must be credited on the debt; and in respect to the right to use as a recompense for *care and attention* in keeping, he questions "how far any such implied right of use exists, even in this class of cases, unless there is some understanding between the parties to that effect," and that "it will be safe to conclude that no right to use the pledge exists, unless it was expressly stipulated or clearly implied." Redfield on Bailments, p. 527. "He may use the horse in a reasonable manner, or milk the cow in recompense *for the meat*." Coggs v. Bernard, *supra*. "The pledge is given as a security; it does not imply any indirect benefit to the pledgee; he must therefore account for whatever income he receives from the pledge." Houton v. Holliday, 2 Murphy, 111; 5 Am. Dec. 522. Where the owner of a pledged slave recovered the value of the slave's services above the amount of the interest on the debt (the principal having been paid), the pledgee must account for rents, profits and increase of the thing pledged, in the absence of a contrary agreement. Geron v. Geron, 15 Ala. 558; 50 Am. Dec. 143; Gilson v. Martin, 49 Vt. 474; Hunsaker v. Sturgis, 29 Cal. 142.

[2] Walcott v. Keith, 2 Foster, 196; Coleman v. Shelton, 2 McCord Ch. 126; Noles v. Marrable, 50 Ala. 366. See Palmtag v. Doutrick, 59 Cal. 154; 43

and against a third party for conversion thereof.[1] But if he unreservedly redelivers it to the pledgor his right is lost.[2] But not so if the redelivery is for a special purpose.[3] He loses his right by surrendering to a third person and taking a written guaranty of the debt.[4]

Duty of pledgee to return.—The pledgee is bound to return the article pledged on payment of the debt or on tender thereof, and for refusal he is liable in replevin or trover.[5] Ordinarily he must return the identical article, but in the case of stocks, other stocks of the same description will answer.[6] If he has so dealt with the article that he cannot return it, whether by unlawful sale, or by use, or pledge, he is liable for conversion.[7] So if he has inextricably mingled it with his own goods.[8] In such cases it is sometimes held that the pledgor's right of action accrues without tender of the debt.[9]

Am. Dec. 245; Neff v. Thompson, 8 Barb. 213; Outcalt v. Durling, 25 N. J. L. 443.

[1] Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770; Jones v. McNeil, 2 Bailey, 466; Cowing v. Snow, 11 Mass. 415; Burdict v. Murray, 3 Vt. 302; 21 Am. Dec. 588; Root v. Chandler, 10 Wend. 110; 25 Am. Dec. 546.

[2] Walker v. Staples, 5 Allen, 34; Citizens' Nat. Bank v. Hooper, 47 Md. 88; Russell v. Fillmore, 15 Vt. 135; Look v. Comstock, 15 Wend. 244.

[3] Reeves v. Capper, 5 Bing. N. C. 136; Thayer v. Dwight, 104 Mass. 254 Hutton v. Arnett, 51 Ill. 198.

[4] Treadwell v. Davis, 34 Cal. 601; 94 Am. Dec. 770.

[5] Lawrence v. Maxwell, 53 N. Y. 19; Geron v. Geron, 15 Ala. 558; 50 Am. Dec. 143; Coggs v. Bernard, *supra;* Ball v. Stanley, 5 Yerg. 199; 26 Am. Dec. 263; Bryson v. Rayner, 25 Md. 424; 90 Am. Dec. 69.

[6] Gilpin v. Howell, 5 Pa. St. 41; 45 Am. Dec. 720, and cases in note 731.

[7] Lawrence v. Maxwell, *supra;* Strong v. Nat. Bkg. Assn. 45 N. Y. 718; Kitchell v. Vandar, 1 Blackf. 356; 12 Am. Dec. 249; Ainsworth v. Bowen, 9 Wis. 348; Gay v. Moss, 34 Cal. 125; Wilson v. Little, 2 N. Y. 443. In case of the pledgee's pledge of the property the owner may ratify it or repudiate it. Strong v. Adams, 30 Vt. 221; 73 Am. Dec. 305.

[8] Hart v. Ten Eyck, 2 Johns. Ch. 62; Ringgold v. Ringgold, 1 Har. & G. 11.

[9] See cases above, 7; Lucketts v. Townsend, 3 Tex. 119; 49 Am. Dec. 723. The Massachusetts cases hold the contrary. Cumnock v. Newburyport Sav.

Pledgee's remedies.—On maturity of the debt and the pledgor's default, the pledgee may (1) proceed against the pledgor personally without resort to the pledge; or (2), he may enforce the pledge by suit in the nature of a foreclosure; or (3), he may sell the pledge, upon reasonable notice to the pledgor of the time and place, and after calling on him to redeem.[1]

(1). That he may proceed personally against the pledgor is well settled. The pledgor cannot compel him to resort to the pledge.[2]

Inst., 142 Mass. 342; 56 Am. Rep. 679. The court said: "The second count apparently proceeds upon the theory that the payment of the note and the return of the stock were to be concurrent acts. But the contract of the defendant was to keep the certificates of stock with due care, and to return them to the plaintiff if the note was paid at maturity, or when after maturity the note was paid, unless the stock was meanwhile lawfully sold to pay the debt. The contract of pledge is collateral to the contract to pay the debt. The promise is to return the property pledged when the debt is paid. The pledgee can maintain an action to recover the debt, without any offer to restore the property pledged (Taylor v. Cheever, 6 Gray, 146), and he can maintain an action for money lent, after he has converted the property pledged by an unlawful sale, and can recover the debt less the amount realized by the sale, if he pleads this in set-off. Fay v. Gray, 124 Mass. 500. Notwithstanding what was said in Cortelyou v. Lansing, 2 Caine's Cas. 200, we think that the assumption is false that a contract of pledge as a security for the payment of money is analogous to a bilateral executory contract in which the two parties mutually promise to do concurrent acts, and the promise of one is the consideration of the promise of the other. The modern authorities therefore require a tender of payment of the debt to enable the pledgor to maintain trover for the conversion of property pledged, unless the lien created by the pledgee has been otherwise discharged." Citing Talty v. Freedman's, etc., Co., 93 U. S. 321; Lewis v. Mott, 36 N. Y. 395; Donald v. Suckling, L. R., 10 B. 585; Halliday v. Holgate, L. R. 3 Ex. 299. Mr. Freeman gives the view stated in the text; note, 49 Am. Dec. p. 735. Redfield says (Bailment, p. 529), "by tendering the amount he may have trover." Citing Flowers v. Sprowle, 2 Marsh, 56. See Cooper v. Ray, 47 Ill. 53.

[1] Note, 49 Am. Dec. 736; Robinson v. Hurley, 11 Iowa, 410; 79 Am. Dec. 497, and note 499.

[2] Badlam v. Tucker, 1 Pick. 389; 11 Am. Dec. 202; Robinson v. Hurley,

(2). The remedy by foreclosure is necessary where notice cannot be given to the pledgor.[1] This is the appropriate and only safe remedy when the pledge is a thing in action without a recognized market value, like government bonds, stocks, etc.[2]

(3). The remedy by sale in other cases is usual and proper, with the precautions above mentioned.[3] Formal notice of sale is not necessary if the pledgor knows of the time and place,[4] or if he prevents notice.[5] The pledgor pledgor ratifies by consent or acceptance of the proceeds.[6]

But in the case of a pledge of negotiable commercial paper, as collateral security, the pledgee may not sell, unless he is expressly authorized so to do by the pledgor;

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11 Iowa, 410; 79 Am. Dec. 497; Bank of Rutland v. Woodruff, 34 Vt. 89; Dugan v. Sprague, 2 Ind. 600; Richardson v. Ins. Co., 27 Gratt. 749; Rozet v. McClellan, 48 Ill. 345; 95 Am. Dec. 551; Cooper v. Simpson, 41 Minn. 46; 16 Am. St. Rep. 667.

[1] Hart v. Ten Eyck, 2 Johns. Ch. 62; Bowman v. Wood, 15 Mass. 534; Strong v. Nat. B. Ass'n, 45 N. Y. 718. But it has been held that if the pledgor is beyond the seas, notice may be served on his agent. Potter v. Thompson, 10 R. I. 1.

[2] Stearns v. Marsh, 4 Denio, 227; 47 Am. Dec. 248; Wheeler v. Newbould, 16 N. Y. 392; Gay v. Moss, 34 Cal. 125; De Lisle v. Priestman, 1 Browne, 176; Boynton v. Payrow, 67 Me. 587.

[3] Gay v. Moss, 34 Cal. 125; Bryan v. Baldwin, 52 N. Y. 233; Robinson v. Hurley, 11 Iowa, 410; 79 Am. Dec. 497; Cushman v. Hayes, 46 Ill. 145; Washburn v. Pond, 2 Allen, 474; Mowry v. Wood, 12 Wis. 413; Stevens v. Hurlbut Bank, 31 Conn. 146; Diller v. Brubaker, 52 Pa. St. 498; 91 Am. Dec. 177; Morgan v. Dod, 3 Colo. 551; Goldsmidt v. Worthington M. E. Church, 25 Minn. 202; Baltimore, etc., Ins. Co. v. Dalrymple, 25 Md. 269. See note, 79 Am. Dec. 499. McQueen's Appeal, 104 Pa. St. 596; 49 Am. Rep. 592; Baker v. Drake, 66 N. Y. 518; 23 Am. Rep. 80.

[4] Alexandria, etc., R. Co. v. Burke, 22 Gratt. 254.

[5] City Bank v. Babcock, 1 Holmes, 181.

[6] Hamilton v. State Bank, 22 Iowa, 306; Genet v. Howland, 45 Barb. 560.

his duty is to collect,[1] and for this purpose he may maintain suit in his own name.[2]

If the pledgee becomes the purchaser, either directly or indirectly, unless expressly authorized by the contract, the pledgor may elect to treat the sale as void, and this keeps in force the old relation.[3] His election must be exercised within a reasonable time.[4] The sale is not void but voidable.[5] If the pledge is divisible, the pledgee is liable for selling more than is necessary.[6] If an unlawful sale is made, this may be set up by the pledgor in an action by the pledgee to recover the debt.[7] If the pledgee exchanges the pledge with a third person, the pledgor may within a reasonable time maintain an action against the pledgee for the original pledge.[8]

Provisions in the contract.—Very generally where the pledge is evidenced by writing, especially in the case of collateral securities, the writing provides for the mode of sale, and in such cases is of course controlling.[9] But such contracts must be strictly observed; so if the writing, for example, provided that the sale might be without notice to the pledgor of the sale, this would not excuse the lack of notice to redeem.[10] And so if the pledgee was author-

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[1] Fletcher v. Dickinson, 7 Allen, 23; Wheeler v. Newbould, 16 N. Y. 392; Jones on Pledges, § 651, and cases cited; *infra*, Collateral Securities.

[2] Paine v. Furnas, 117 Mass. 290; Jones on Pledges, § 664, and cases cited.

[3] Stokes v. Frazier, 72 Ill. 428; Bank of Old Dominion v. Dubuque, etc., R. Co. 8 Iowa, 277; 74 Am. Dec. 302; Bryson v. Raynor, 25 Md. 424; 90 Am. Dec. 69; Maryland F. Ins. Co. v. Dalrymple, 25 Md. 242; 89 Am. Dec. 779.

[4] Hill v. Finnegan, 77 Cal. 267; 11 Am. St. Rep. 279; McDowell v. Chicago Steel Works, 124 Ill. 491; 7 Am. St. Rep. 381.

[5] Bryan v. Baldwin, 52 N. Y. 232.

[6] Fitzgerald v. Blocher, 32 Ark. 742; 29 Am. Rep. 3.

[7] Stearns v. Marsh, 4 Denio, 227; 47 Am. Dec. 248.

[8] Strong v. Adams, 30 Vt. 221; 73 Am. Dec. 305.

[9] Chouteau v. Allen, 70 Mo. 290.

[10] Jeanes' Appeal, 116 Pa. St. 573; 2 Am. St. Rep. 624.

ized to sell stocks before maturity of the debt, if they "depreciated in market value," this gave no authority to sell where the stocks were bogus.[1] A provision that failure to make prompt payment should vest absolute title in the pledgee is void.[2]

Assignment.—The pledgee may assign or sell his interest, *i. e.*, his right to possession, in the pledge, providing he does not assume to act as absolute owner.[3] But the pledgee of lent property with notice of the real ownership cannot confer any title although the pledgor has apparent title.[4] The purchaser may enforce the pledgee's lien.[5]

Redemption.—The pledgor may redeem at any time in the absence of agreement to the contrary, and the right survives to his personal representatives.[6] But as a general rule the statute of limitations begins to run when the debt falls due.[7] If the goods are pledged for an illegal debt, the pledgor must still pay it before he can reclaim the pledge.[8] If on payment or tender the pledgee does not redeliver, the pledgor may bring replevin or trover, or maintain a suit in equity for redemption.[9] But a suit for redemption must be brought within a reasonable time.[10] Tender even after maturity discharges the pledgee's lien.[11]

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[1] Nat. Bk. v. Baker, 128 Ill. 533; 4 L. R. A. 586.

[2] Lucketts v. Townsend, 3 Tex. 119; 49 Am. Dec. 723.

[3] Whitaker v. Sumner, 20 Pick. 399; Bullard v. Billings, 2 Vt. 309; Belden v. Perkins, 78 Ill. 449; Allen v. Dykers, 3 Hill, 593.

[4] Porter v. Parks, 49 N. Y. 564.

[5] Lewis v. Mott, 33 N. Y. 395.

[6] Cortelyou v. Lansing, 2 Caines' Cas. 200; Perry v. Craig, 3 Mo. 516.

[7] Roberts v. Sykes, 30 Barb. 173; Waterman v. Brown, 31 Pa. St. 161. But see Jones v. Thurmond, 5 Tex. 318.

[8] King v. Green, 6 Allen, 139.

[9] Chapman v. Turner, 1 Call, 280; Flowers v. Sproule, 2 A. K. Marsh, 54; Brown v. Runals, 14 Wis. 693; Bartlett v. Johnson, 9 Allen, 530; Conyngham's Appeal, 57 Pa. St. 474.

[10] Gilmer v. Morris, 80 Ala. 78; 60 Am. Rep. 85.

[11] Norton v. Baxter, 41 Minn. 146; 4 L. R. A. 305.

Collateral securities.— By this term is understood evidences of debt in contradistinction to ordinary chattels. The law respecting them is the same as in regard to mere chattels so far as concerns the effecting, the right of possession and the care of the pledge, and the sale when it is not a thing in action, but when the pledge is negotiable paper a different rule exists. If negotiable paper is pledged as security, and is allowed to remain in the pledgee's hands until maturity, he is bound to present it for payment, and if it is not paid, to take the necessary steps to fix the liability of all the parties thereon, in the same manner as if he was the absolute owner.[1] The pledgee cannot sell the paper; he must proceed to collect it.[2] But ordinary diligence and skill are all that it devolves on the pledgee to exercise.[3] If by reason of the pledgee's neglect or carelessness in this regard the collateral becomes worthless, uncollectible, or impaired, the pledgee is liable therefor.[4] To the extent of the collateral the pledgor's debt thereby becomes extinguished.[4] If the paper is indorsed he may sue in his own name;[5] if

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[1] Peacock v. Pursell, 14 C. B. (N. S.), 728; Betterton v. Roope, 3 Lea, 215; Smith v. Miller, 43 N. Y. 171; 3 Am. Rep. 690; Alexandria, etc., R. Co. v. Burke, 22 Gratt. 254; May v. Sharp, 49 Ala. 140; Reeves v. Plough, 41 Ind. 204; Hanna v. Holton, 78 Pa. St. 334; 21 Am. Rep. 20; Whitten v. Wright, 34 Mich. 92; Lamberton v. Windom, 12 Minn. 232; 90 Am. Dec. 301; Atlas Bank v. Doyle, 9 R. I. 76; 11 Am. Rep. 219; Roberts v. Thompson, 14 Ohio St. 1; 82 Am. Dec. 465. See notes, 34 Am. Dec. 451; 79 id. 503. First Nat. Bank v. O'Connell, 84 Iowa, 377; 35 Am. St. Rep. 313; Rumsey v. Laidley, 34 W. Va. 721; 26 Am. St. Rep. 935; Griggs v. Day, 136 N. Y. 152; 32 Am. St. Rep. 704, and note 711

[2] Joliet Iron Co. v. Scioto F. B. Co., 82 Ill. 584; 25 Am. Rep. 341; Fletcher v. Dickinson, 7 Allen, 23; Wheeler v. Newbould, 16 N. Y. 392.

[3] Reeves v. Plough, *supra*; Goodall v. Richardson, 14 N. H. 567. "Supine negligence" is what the pledgee is answerable for. Hanna v. Holton, *supra*.

[4] Peacock v. Pursell, *supra*.

[5] Kinney v. Kruse, 28 Wis. 183; Tarbell v. Sturtevant, 26 Vt. 513; Lobdell v. Merch. Bank, 33 Mich. 408.

not indorsed, he may use the payee's name.[1] He need not make previous demand of the pledgor.[2] He need not wait till the pledgor's debt is due,[3] but he cannot apply the proceeds to his debt until it is due;[4] he must first call on the pledgor to redeem;[5] he can recover the whole amount of the pledge, and is liable to the pledgor only for the surplus.[6] The pledge of a mortgage binds the pledgee to foreclose with ordinary diligence. But the pledge of a warehouse receipt does not bind the pledgee to look after the safety of the property in the warehouse.[7] Neither pledgee nor pledgor of a claim can compromise it, at least while the debtor knows of the pledge.[8] Provisions in a written assignment of pledge will control as in other cases.[9] The creditor may assign his claim and the collateral.[10] A third party in good faith, acquiring negotiable securities transferable by delivery from a pledgee acquires good title.[11] If negotiable collaterals deposited with an agent on a loan of his principal's money are fraudulently appropriated by him, the principal must answer to the borrower.[12] If the pledgee sells the securities wrongfully, the pledgor may maintain a suit for redemption and recover their value

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[1] Jones v. Witter, 13 Mass. 304; in New York in his own name; Van Riper v. Baldwin, 85 N. Y. 618.

[2] Paine v. Furnas, 117 Mass. 290.

[3] Jones v. Hawkins, 17 Ind. 550.

[4] Farwell v. Imp., etc., Bank, 90 N. Y. 483.

[5] Strong v. Nat. Bank Ass'n, 45 N. Y. 720.

[6] Atlas Bank v. Doyle, 9 R. I. 76; 11 Am. Rep. 219.

[7] Willets v. Hatch, 132 N. Y. 41; 17 L. R. A. 193.

[8] Fairbanks v. Sargent, 117 N. Y. 320; 6 L. R. A. 475.

[9] Roberts v. Thompson, 14 Ohio St. 1; 82 Am. Dec. 465; Pickens v. Yarborough's Adm's, 26 Ala. 417; 62 Am. Dec. 728.

[10] Chapman v. Brooks, 31 N. Y. 75.

[11] Coit v. Humbert, 5 Cal. 260; 63 Am. Dec. 128.

[12] Reynolds v. Witte, 13 S. C. 5; 36 Am. Rep. 678.

at the time of its commencement.[1] But a suit to redeem must be brought with reasonable promptness.[2]

Pawnbrokers.— A pawnbroker is one who makes it a business to lend money on the pledge of personal property of small size and easily portable, such as clothing, watches, jewelry, heir-looms, pictures, etc. His occupation is always subject to license and regulated by statute.[3] It is of the essence of his occupation that he lends upon goods deposited with him, and not on choses in action or evidences of debt; so one who lends on mortgage on personal property, or on stocks, bonds or notes is not a pawnbroker.[4]

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[1] Fowle v. Ward, 113 Mass. 548; 18 Am. Rep. 534.

[2] Gilmer v. Morris, 80 Ala. 78; 60 Am. Rep. 85.

[3] The familiar sign of the pawnbroker, the three gilded balls, is said to be derived from the arms of the Medici family. The Lombards were the first great money-lenders in Europe, and this family was the greatest of mediæval bankers. One account of the origin of the three balls is that they indicated pills, referring in a punning way to the profession of medicine suggested by the family name. Roscoe however records that they refer to the mace or club of Magello, with three iron balls attached to it, which Averardo d'Medici took from him when he slew him, under Charlemagne. The modern slang term, "my uncle," is said to be derived from *uncus*, a hook, referring to the implement which pawnbrokers used to handle goods before spouts come in vogue. To "spout" personal property means, of course, to send it up the spout so commonly used in the pawnbroker's shops. The French phrase to describe goods in pawn, "*a ma tante*" (at my rascal's), shows the low repute in which this occupation was originally (perhaps is still) held.

[4] City of Chicago v. Hulbert, 118 Ill. 632; 59 Am. Rep. 400.

CHAPTER VI.

HIRE FOR PERSONAL USE.

This species of bailment (*locatio rei*), by which the bailor allows the bailee to have the use of a thing, implies (1) that the bailee shall use the thing with moderation and care; (2) that he shall not put it to any other use than that stipulated; (3) that he shall return it at the agreed time; (4) that he shall pay the hire.[1]

(1). **Care in use.**—The bailee is bound to ordinary diligence and care, and liable for greater than slight negligence.[2] If one hires a horse he must feed him properly,[3] but if it casts a shoe probably is not bound to have it restored; or if he hires a carriage he is not bound to keep it in repair.[4] If the horse becomes sick he is bound to call a farrier and will not be responsible for his mistaken treatment; but otherwise if he himself prescribes or allows others unskilled to do so.[5] If the horse becomes sick without the hirer's fault, the owner and not the hirer is liable for the expense of caring

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[1] De Tollenere v. Fuller, 1 Const. (S. C.), 121; Millon v. Salisbury, 13 Johns. 211; Lockwood v. Bull, 1 Cow. 322; 13 Am. Dec. 539.

[2] Clark v. U. S., 95 U. S. 542. Bracton says, "the utmost diligence, such as the most diligent father of a family uses," and this with Coggs v. Bernard, is cited by Redfield to the proposition, that the bailee is bound to take the utmost care. But it is a misleading statement. That the hirer is bound only to ordinary diligence is decided also in Mooers v. Larry, 15 Gray, 451; Angus v. Dickerson, 1 Meigs, 459; Millon v. Salisbury, 13 Johns. 211; Jackson v. Robinson, 18 B. Mon. 1; Mayor of Columbus v. Howard, 6 Ga. 213.

[3] Handford v. Palmer, 2 Brod. & B. 359; Chafee v. Postal Teleg. Co., 35 S. C. 372.

[4] Story Bailm. §§ 388, 389.

[5] Dean v. Keate, 3 Campb. 4.

for it.[1] But if the horse becomes sick by the fault of the hirer, and he returns it to the owner in that condition, and the latter employs a farrier who treats it according to his best judgment, and the horse dies, the hirer is liable for its value although the treatment may have contributed to its death.[2] The hirer may justifiably allow his servants to use the property, as for example, to drive a horse, but he is liable for their misconduct as for his own.[3] If the property is under the management of the owner's servant, as where he lets a horse, carriage and driver, the hirer is not liable for the acts of that servant if he continues to be the servant of the owner, but if he becomes the servant of the hirer the latter is liable. Everything depends upon the right of control.[4] If the team is injured in consequence of use outside of the stipulated employment, against the protest of the driver, the hirer is liable.[5]

(2). **Extent of use.**—It was formerly decided that driving a horse beyond the stipulated place is a conversion,[6] and if the horse is lost or injured thereby the hirer is liable therefor irrespective of negligence.[7] Where a vessel was

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[1] Leach v. French, 99 Me. 389; 31 Am. Rep. 296.

[2] Eastman v. Sanborn, 3 Allen, 594; 81 Am. Dec. 677.

[3] Story Bailm. § 400.

[4] Laugher v. Pointer, 5 B. & C. 547; Quarman v. Burnett, 6 M. & W. 499; Blackwell v. Wiswall, 24 Barb. 355; Hilliard v. Richardson, 3 Gray, 349; Ames v. Jordan, 71 Me. 540; 36 Am. Rep. 352; Joslin v. Grand Rapids Ice Co., 50 Mich. 516; 45 Am. Rep. 54; Hershberger v. Lynch, — Pa. St. —; Browne Dom. Rel. p. 139.

[5] Fox v. Young, 22 Mo. App. 386.

[6] Woodman v. Hubbard, 25 N. H. 67; 57 Am. Dec. 310; Rotch v. Hawes, 12 Pick. 136; 22 Am. Dec. 414.

[7] De Voin v. Mich. Lumber Co., 64 Wis. 616; 54 Am. Rep. 649; Farkas v. Powell, 86 Ga. 800; 12 L. R. A. 397; Malaney v. Taft, 60 Vt. 571; 6 Am. St. Rep. 135; De Tollenere v. Fuller, 1 Mill, 117; 12 Am. Dec. 616 (slave sent to a place infected by small-pox); Hart v. Skinner, 16 Vt. 138; 42 Am. Dec. 500 (wagon driven with heavy load to different place); Towne v. Wiley, 23

let for use only as a receiving barge, and the hirer used it as a transporting barge, and it was sunk, he was held liable for the value irrespective of negligence.[1] Where a slave let to clean streets was put to work under the precipitous mouth of a drain and there killed by its fall, the hirer was held.[2]

Vt. 355; 56 Am. Dec. 85; Coupé Co. v. Maddick, [1891], 2 Q. B. 413 (coachman driving for his own purpose); Welch v. Mohr, 93 Cal. 371.

[1] Beach v. Raritan, etc. R. Co., 37 N. Y. 457.

[2] Mayor of Columbus v. Howard, 6 Ga. 213. The recent tendency is to hold that the mere use of the property beyond the agreed limits does not work a conversion, and that the hirer is not liable for the loss or injury unless it occurred outside that limit or in consequence of that excessive use. In Doolittle v. Shaw, Supreme Court of Iowa (60 N. W. R. 621), 26 L. R. A. 366, it was held that where a horse is hired to be driven to a certain place and return, an extension of travel beyond the limit specified is not such an assertion of title to the property as will amount to conversion. The court cited Spooner v. Manchester, 133 Mass. 270; Evans v. Mason, 64 N. H. 98; Story Bailm. § 419; Schouler Bailm. p. 137; Farkas v. Powell, *supra;* Harvey v. Epes, 12 Gratt. 153; Cullen v. Lord, 39 Iowa, 302; and observed: "We are not willing to give our sanction to the broad, and when applied to a case like that at bar, harsh rule of the instruction. It must be borne in mind, that in almost every case where that strict rule has been applied, the facts have shown that the hirer, in addition to departing from the contract line of travel, was guilty of negligence or of willful misconduct, or that he injured or destroyed the property while outside of the limits of the contract of hiring." The court approves the following from Farkas v. Powell, *supra:* "But the main question in this case is, would Powell, after having been guilty of a technical conversion or violation of his duty, and having returned within the limits of the original hiring, and the horse then sustained an injury without other fault on his part, be liable? That would depend, in our opinion, upon whether the extra ride of six or eight miles to the Bryant place and back caused or materially contributed to the accident. If it did, we think he would be liable to the owner. * * * If, however, the extra ride did not cause or materially contribute to the injury, we do not think Powell would be liable, if guilty of no other fault;" and also the following from Harvey v. Epes, 12 Grat. 153, where the contract was one for the hire of slaves for a year, to work in a certain county, and they were taken by the hirer, without the owner's consent, to another county and employed in the same kind of work, and while there died: "Upon the whole, I am of the opinion that in the case

(3). **Return of property.**—A hirer cannot confer title on a purchaser in good faith.[1] Failure to return the property effects a conversion. So where the bailee sells the property. So the sale by the bailee during the term terminates the bailment and effects a conversion.[2] But in the absence of an absolute agreement to return at all hazards, the return is excused by the loss of the property by theft or accident or death, without the bailee's fault.[3]

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of a bailment for hire for a certain term, * * * the use of the property by the hirer during the term for a different purpose, or in a different manner from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction of the property be thereby occasioned, or at least unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein. * * * If he merely uses the property in a manner or for a purpose not authorized by the contract, and without destroying it, or without intending to injure or impair the reversionary interest of the bailor therein, such misuse does not determine the bailment, and therefore is not a conversion for which trover will lie;" and the court then citing Cullen v. Sard, *supra*, thus conclude: "While the facts in that case, so far as they appear, are not like those in the case at bar, still we think there is a clear recognition of the doctrine that in cases of a letting for reward, a mere violation of the contract, without more, will not fix a liability as for a conversion. To constitute a conversion, in a case like that at bar, there must be some exercise of dominion over the thing hired, in repudiation of, or inconsistent with, the owner's rights. We hold that the mere act of deviating from the line of travel which the hiring covered, or going on beyond the point for which the horse was hired, are acts which, in and of themselves, do not necessarily imply an assertion of title or right of dominion over the property inconsistent with, or in defiance of, the bailor's interest therein."

[1] Bailey v. Colby, 34 N. H. 29; 66 Am. Dec. 752, and note 758.

[2] Russell v. Favier, 18 La. 585; 36 Am. Dec. 662.

[3] Coggs v. Bernard, *supra*. Where one hired a horse and wagon to go to a certain town and return, and agreed to put them in a livery stable at such town during his stay, but failed to do so and left them in the public street unattended, he was held liable for the loss by theft of the horse and wagon, whip and lap robe. Line v. Mills, Ind. App. Ct. 39 N. E. Rep. 870. The hirer is not liable for the loss of the property by fire without his fault. Seevers v. Gabel, Iowa, 27 L. R. A. 733. The court cited the following analogous cases: "In McEvers v. Steamboat Sangamon, 22 Mo. 188, a barge was hired by the

(4). **Payment of hire.**—If the thing hired fails to answer the purpose for which it was let and hired, without the hirer's fault, the hirer is not bound to make compensation beyond the benefit realized.[1] In case of hire of an animal

defendant under an agreement that it was 'to be delivered in good order, the usual wear and tear excepted.' The barge was destroyed by ice, and it was held that the steamboat was not liable, on the contract, for the non-delivery of the barge. In Young v. Bruces, 5 Litt. (Ky.) 324, the contract was for the hire of a slave 'until said 25th of December, 1819, to be returned, well clothed, at that time.' Defendants answered that the slave was drowned by inevitable accident, without fault of theirs, whereby they were prevented from returning him. The court held that it was not the intention of the parties that the defendants should be responsible for the death of the slave without fault on their part, and that the demurrer was properly overruled. In Harris v. Nicholas, 5 Munf. 483, the contract was for the hire 'of four negro fellows the present year, who are to be returned, well clothed, on or before the 25th of December.' Defendant answered that before the expiration of the time one of the negroes, without fault on defendant's part, departed this life. The court held that if the covenant could be considered 'as a covenant to return the negro in question, as well as to secure the payment of the money due for his hire, it ought not to be considered as a covenant to insure such return in the event which has happened.' In Maggort v. Hansbarger, 8 Leigh, 532, the plaintiff leased to the defendant certain real estate, upon which there was a grist-mill and carding machine, defendant agreeing 'to return the said property with all its appurtenances.' The mill and carding machine were destroyed by fire accidentally, or by some unknown incendiary. It was held that the contract was distinguishable from those wherein the party covenants to keep in order, and that the tenant was not bound to rebuild. In Warner v. Hitchins, 5 Barb. 666, the defendants bound themselves, 'at the expiration of the lease, to surrender up possession of the premises in the same condition they were in at the time of making the lease, natural wear and tear excepted.' The court, after a thorough and extended consideration of the subject, held that the tenants were not bound to put up new buildings in the places of those destroyed by fire, distinguishing the case from those wherein covenants to repair are made. In Wainscott v. Silvers, 13 Ind. 497, it was held that a tenant is not answerable, in the absence of an express agreement, for the destruction by accidental fire of buildings occupied. This case is clearly distinguishable from those wherein there is an agreement to keep leased property in repair."

[1] Harrington v. Snyder, 3 Barb. 380.

the hirer runs the risk of its sickness or death during the term and can claim no deduction from the hire.[1] But custom to the contrary will relieve the hirer from payment except in proportion to the benefit realized.[2] But if the owner knew that the animal was unsound at the time of letting, and fraudulently concealed it, the hirer may avoid payment by offering to return and rescind.[3]

Bailee's right of possession during the term.—This is valid as against the bailor and his creditors.[4] And it is not extinguished by a sale by the bailor to the bailee which was fraudulent and void;[5] but it is extinguished by the bailee's sale to a third party during the term, and the bailor may maintain trover against the purchaser before the expiration thereof.[6]

Actions by bailee.—The hirer may maintain an action against a third person for an injury to the property, although the owner had repaired it and charged it to the hirer, at his request, and the hirer had not paid him.[7] And so he may recover against one taking the chattel.[8]

Void contract.—Although the contract is void, as for example, because made on Sunday, yet the hirer is liable for any injury done to the property through his misuse or carelessness.[9]

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[1] Dickinson v. Cruise, 1 Head, 258 (slave hired for a year, and dying at beginning of term).

[2] Griswold v. Taylor, 1 Met. (Ky.) 228; Wilkinson v. Moseley, 30 Ala. 562; Birge v. Wanhop, 21 Tex. 478.

[3] Reading v. Price, 3 J. J. Marsh, 61; 19 Am. Dec. 162 (slave).

[4] Smith v. Niles, 20 Vt. 315; 49 Am. Dec. 782.

[5] Britt v. Aylett, 11 Ark. 475; 52 Am. Dec. 282.

[6] Swift v. Moseley, 10 Vt. 208; 33 Am. Dec. 197; Sanborn v. Colman, 6 N. H. 14; 23 Am. Dec. 703; Johnston v. Whittemore, 27 Mich. 469.

[7] Brewster v. Warner, 136 Mass. 57; 49 Am. Rep. 5.

[8] Shaw v. Kaler, 106 Mass. 448; Swire v. Leach, 18 C. B. (N. S.) 479.

[9] Stewart v. Davis, 31 Ark. 518; 25 Am. Rep. 576; Frost v. Plumb, 40 Conn. 111; 16 Am. Rep. 18; Fisher v. Kyle, 27 Mich. 454; Hall v. Corcoran, 107 Mass. 251; 9 Am. Rep. 30; Woodman v. Hubbard, 25 N. H. 67; 57 Am.

Implied qualities.—If one lets a chattel for a specific use he impliedly warrants that it is fit for that use, so far as a reasonable amount of care can effect it. So if one lets a vicious horse, knowing its propensities, and fails to notify the hirer thereof, he is liable for injury in consequence,[1] but not so if he was ignorant of the viciousness.[2] A livery stable keeper is liable to a hirer of a vehicle for an injury happening through a defect in it which might have been discovered by the most careful examination, but not where the defect was undiscoverable.[3]

Burden of proof.—In an action of negligence against a bailee for hire, the burden of proof is on the plaintiff, and is not shifted by proof that the property was sound when delivered, and when returned was injured in a way that ordinarily does not occur without negligence.[4]

Sale by bailee.—If the bailee sells the property, without authority, even to an innocent purchaser, the latter gets no title.[4] (See ref. 6, p. 43.)

Presumption.—Where one receives and uses valuable personal property of another for a considerable length of time, a contract of hiring and not a gratuitous loan is *prima facie* presumed.[5]

Dec. 310. *Contra:* Parker v. Latner, 60 Me. 528; 11 Am. Rep. 210; Smith v. Rollins, 11 R. I. 464; 23 Am. Rep. 509.

[1] Kissam v. Jones, 56 Hun, 432.

[2] Copeland v. Draper, 157 Mass. 558; 34 Am. St. Rep. 314. But if he is ignorant of the viciousness through negligence his ignorance is no defence. Horne v. Meakin, 115 Mass. 326.

[3] Hadley v. Cross, 34 Vt. 586; 80 Am. Dec. 699; Fowler v. Lock, L. R. 10 C. P. 90; Ingalls v. Bills, 9 Metc. 1; 43 Am. Dec. 346; Mahoney v. Saft, *supra;* Claflin v. Meyer, 75 N. Y. 260; 31 Am. Rep. 467; Willett v. Rich, 142 Mass. 356; 56 Am. Rep. 684. *Contra:* Cumins v. Wood, 44 Ill. 416; 92 Am. Dec. 189.

[4] Miller Piano Co. v. Parker, 155 Pa. St. 208; 35 Am. St. Rep. 873; Singer Man. Co. v. Belgart, 84 Ala. 519; Crocker v. Gullifer, 44 Me. 491; 69 Am. Dec. 118 note; 24 Am St.Rep. 814; Dunlap v.Gleason, 16 Mich. 158; 93 Am.Dec. 231.

[5] Rider v. Union Rubber Co. 28 N. Y. 379; Cullen v. Lord, 39 Iowa, 302.

CHAPTER VII.

KEEPING OR STORAGE.

This species of bailment (*locatio custodiæ*) arises where one delivers to another property for safe-keeping for hire. In some cases the property is merely to be kept without any active attention on the part of the bailee, as for example, the storage of furniture; in others the contract implies a certain amount of active care and attention, as for example, the pasturing of cattle; and in others a still greater amount of attention is implied, as in the case of a boarding-stable keeper. The last two classes approach the third class of compensated bailments, the delivery of property to have labor or services bestowed on or about it, for reward (*locatio operis faciendi*), but they are in most respects more nearly within the *locatio custodiæ*, and more conveniently to be considered under that head. This class embraces Agisters, Livery Stable-keepers, Warehousemen and Wharfingers, Safe-deposit Storekeepers, and Banks in the rare cases in which they take deposits for reward.

Degree of care.—These bailees are held to ordinary care and answerable for any greater than slight negligence. The character of the property and the degree of care which the bailee impliedly represents himself as ready to bestow are to be taken into consideration. So where one deposited a trunk of goods with an upholsterer and the contents were stolen by his servants, he was held not liable, because he had taken the same care as of his own goods.[1] But where a watchmaker kept watches left for repair in a less secure place than his own, he was held liable for theft by his servants.[2] So where plaintiff stored carriages in defendant's

[1] Finucane v. Small, 1 Esp. 315.

[2] Clark v. Earnshaw, 1 Gow, 30.

barn for hire, and they were injured by the fall of the roof under a weight of snow, the defendant was deemed liable unless the defect was unknown to him and could not have been discovered by the use of ordinary care.[1] Where a stable keeper undertook to store a hearse for an undertaker, no stable being specified, but both intending the main stable, and it was put into another stable, he was held not liable for its loss by fire, although it would have been insured at the former and was not at the latter, he supposing his policy covered both.[2] Where a safe-deposit company surrendered property to a third person under claim of legal process, which was void, without investigation and resistance, it was held liable.[3] And where such a company undertook to "keep a constant and adequate guard and watch over and upon the burglar-proof safe" rented by plaintiff, and to protect its contents from dishonesty of the company's employees, it was held bound to explain the disappearance of its contents.[4]

Implied care.—Sometimes the obligation to bestow care is implied from the necessity of circumstances about another transaction. So where a customer is trying on clothes in a clothing shop, and by direction of the proprietor puts his watch in a drawer pending his decision on a purchase, and it is stolen, although this is a deposit without reward in itself, yet it is so connected with the transaction for reward as to demand ordinary care on the part of the shopkeeper.[5] So where a woman, about to purchase a cloak, laid aside her own cloak on a neighboring counter, without any direction.[6] Where proprietors and managers

[1] Moulton v. Phillips, 10 R. I. 218; 14 Am. Rep. 663.

[2] Bradley v. Cunningham, 61 Conn. 485; 15 L. R. A. 679.

[3] Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57; 9 L. R. A. 438; 20 Am. St. Rep. 718.

[4] Safe Deposit Co. v. Pollock, 85 Pa. St. 391; 27 Am. Rep. 660.

[5] Woodruff v. Painter, 150 Pa. St. 91; 30 Am. St. Rep. 786.

[6] Bunnell v. Stern, 122 N. Y. 539; 19 Am. St. Rep. 519. *Contra:* Rea v. Simmons, 141 Mass. 561; 55 Am. Rep. 492.

of a public fair had allotted part of the grounds to target shooting, and the plaintiff attending with a horse and carriage and paying a charge for admission and having no notice of the shooting, tied his horse where others were tied, and it was shot and killed, defendants were held liable.[1] But in an English case, of a bath-house proprietor, the bailment of the customer's clothing and personal valuables was held to be without reward, and so implying no liability except for gross negligence;[2] and in this country an inn-keeper, who kept a separate sea bathing-house, was held not liable for goods and clothes left there by his guests while bathing, and stolen therefrom.[3] Nor can this implied obligation arise where goods have been manufactured for and accepted by a customer and are ready for delivery, and are burned while still in the manufactory.[4] Nor where an owner of an apartment-house allowed a tenant to keep his trunk in a general store-room on the premises without charge.[5]

Lien.—The law gives to this class of bailees (excepting agisters) a lien on, or right to detain the property until his charges for keeping are paid.[6]

Agisters.—An agister is one who pastures cattle for hire. He is held only to ordinary care and liable for any greater than slight negligence.[7] But he must keep his grounds properly fenced,[8] and if in consequence of an insufficient fence

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[1] Conradt v. Clauve, 93 Ind. 476; 47 Am. Rep. 388.

[2] Flint v. Bell, 37 Alb. Law Journ. 87.

[3] Minor v. Staples, 71 Me. 316; 36 Am. Rep. 318.

[4] Cent. Lithog., etc., Co. v. Moore, 75 Wis. 170; 6 L. R. A. 788.

[5] Davis v. Gay, 141 Mass. 531.

[6] Edwards Bailm. § 350, etc.

[7] Rey v. Toney, 24 Mo. 600; 69 Am. Dec. 444; Winston v. Taylor, 28 Mo. 82; 75 Am. Dec. 112; Halty v. Markel, 44 Ill. 225; 92 Am. Dec. 182; Umlauf v. Bassett, 38 Ill. 96; McCarthy v. Wolfe, 40 Mo. 520; Eastman v. Patterson, 38 Vt. 146.

[8] Cecil v. Preuch, 4 Mart. (N. S.) 256; 16 Am. Dec. 171.

sheep escape into another field and there become infected by contact with other sheep, he is liable,[1] and so if in such a case a horse escapes and is gored by a bull.[2] He is liable if the cattle become infected by contact on his own land with animals known to him to be diseased, the owner of the cattle entrusted not knowing it;[3] and the fact that the contract of agistment was void, because made on Sunday, is not a defence.[3]

At common law an agister has no lien.[4] Where the statute gives him a lien, it is inferior to that of a prior chattel mortgage.[5]

At common law, the agister could maintain trespass or trover for injury or conversion to the cattle,[6] and so where by contract he has a special ownership in them.[7] The owner is not liable for trespass of his cattle in keeping of an agister.[8]

Livery stable keepers.—The keeper of a livery stable is liable for a horse entrusted to him and lost by carelessness of his servant.[9] He is not liable for injury by reason of the stable's being blown over, when it was built by a competent contractor.[10]

Where a horse left over night at a livery stable, got untied and ate from an open bag of corn on the floor, and next morning his owner drove him eighteen miles in the

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[1] Sargent v. Slack, 47 Vt. 674; 19 Am. Rep. 136.

[2] Smith v. Cook, L. R., 1 G. B. D. 79.

[3] Costello v. Ten Eyck, 86 Mich. 348; 24 Am. St. Rep. 128.

[4] Bissell v. Pearce, 28 N. Y. 252.

[5] Hanch v. Ripley, 127 Ind. 151; 11 L. R. A. 61; Wright v. Sherman, 3 So. Dak. 367, 17 L. R. A. 792; Sargent v. Usher, 55 N. H. 287; 20 Am. Rep. 208. *Contra:* Case v. Allen, 21 Kans. 217; 30 Am. Rep. 425.

[6] Story Bailm. § 443; Bass v. Pierce, 16 Barb. 595; note, 18 Am. Dec. 550.

[7] New York, etc., R. Co. v. Auer, 106 Ind. 219; 55 Am. Rep. 734.

[8] Ward v. Brown, 64 Ill. 307; 16 Am. Rep. 561.

[9] Swann v. Brown, 6 Jones L. 150; 72 Am. Dec. 568.

[10] Searle v. Laverick, L. R., 9 Q. B. 122.

heat without water, and he was injured, held that the keeper could only be made liable on a finding of negligence on his part and of no negligence on the part of the owner.[1] The stable keeper has a lien for the board of a horse which is not affected by his permitting the owner to ride it.[2]

His statutory lien is subordinate to a prior recorded mortgage.[3]

Warehousemen.—A warehouseman is one who stores goods in a building for reward.

Bailment or sale.—A delicate question frequently arises, whether a deposit of goods with a warehouseman is a bailment or a sale. This has been somewhat considered, *ante*, p. 4. It may now be reiterated that "if a warehouseman receives grain on deposit for the owner, to be mingled with other grain in a common receptacle from which sales are made, the warehouseman keeping constantly on hand grain of a like kind and quality for the depositor, and ready for delivery to him on call, the contract is one of bailment, and not of sale."[4] But if the warehouseman has the option to pay the market price or redeliver the wheat or deliver other wheat, it is a sale and not a bailment.[5] Where grain is deposited with knowledge that it will be mingled with other grain and sold, and its place supplied by other grain, this effects a tenancy in common with all the other

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[1] Dennis v. Huyck, 48 Mich. 620; 42 Am. Rep. 479.

[2] Caldwell v. Tutt, 10 Lea, 258; 43 Am. Rep. 307; and so for the keep and training of a horse; Forth v. Simpson 13 Q. B. 680. But "a mortgagor of horses cannot, without the knowledge, acquiescence and consent of the mortgagee, intrust the horses to be boarded, so as to subject them to a lien for keeping as against the mortgagee." Sargent v. Usher, 55 N. H. 287; 20 Am. Rep. 208.

[3] Sullivan v. Clifton, 55 N. J. L. 324; 20 L. R. A. 719.

[4] Woodward v. Semans, 125 Ind. 330; 21 Am. St. Rep. 225.

[5] Chase v. Washburn, 1 Ohio St. 244; 59 Am. Dec. 623.

depositors.[1] An agreement by a miller to "take" wheat and "give"[2] flour in return imports a sale and not a bailment.[3] But the words, "subject to order when called for, without charge for storage," indicate a bailment.[4] So of the words, "at owner's risk."[5] So of "received in store at two cents."[6]

Degree of care.—The warehouseman is held only to ordinary care, and so is not liable for goods stolen by his servant without his negligence nor for loss by fire[7] He must exercise ordinary care in regard to the construction and safety of the warehouse.[8] And he is bound to ordinary care in guarding the warehouse;[9] and he is liable for loss by fire if he advertises that the goods will be stored in a fire-proof building and stores them in a wooden building.[10] Or falsely represents the building to be fire-proof.[11] He is not answerable for loss by fire if he puts grain in a common bin with his own and that of others, selling therefrom, reserving enough to answer the demand of each owner.[12] If he puts goods

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[1] Browne on Sales, p. 4; note, 54 Am. Dec. 590; Dole v. Olmstead, 36 Ill. 150; 85 Am. Dec. 397; Sexton v. Graham, 53 Iowa, 199.

[2] Schmidt v. Blood, 9 Wend. 268; 24 Am. Dec. 143, and cases in note, 145; Claflin v. Meyer, 75 N. Y. 260; 31 Am. Rep. 467.

[3] Norton v. Woodruff, 2 N. Y. 153; Jones v. Kemp, 49 Mich. 9.

[4] Wadsworth v. Allcott, 6 N. Y. 64.

[5] Irons v. Kentner, 51 Iowa, 88; 33 Am. Rep. 119; Browne on Sales, p. 4, note 8; Ledyard v. Hibbard, 48 Mich. 421; 42 Am. Rep. 474.

[6] Pribble v. Kent, 10 Ind. 326; 71 Am. Dec. 327.

[7] Aldrich v. Boston, etc., R. Co. 100 Mass. 31; 1 Am. Rep. 76; Lancaster Mills v. Merch. C. P. Co., 89 Tenn. 1; 24 Am. St. Rep. 586.

[8] Walden v. Finch, 70 Pa. St. 461.

[9] Jones v. Morgan, 90 N. Y. 4; 43 Am. Rep. 131.

[10] Vincent v. Rather, 31 Tex. 77; 98 Am. Dec. 516; Hatchett v. Gibson, 13 Ala. 587.

[11] Hickey v. Morrell, 102 N. Y. 454; 55 Am. Rep. 825

[12] Rice v. Nixon, 97 Ind. 97; 49 Am. Rep. 430.

in a shed on a wharf he must look out for a sudden rise of the water.[1] The keeper of a private bonded warehouse is liable as an ordinary warehouseman, although a government storekeeper is also in charge,[2] and the same liability attaches to a municipal corporation storing gunpowder outside the city under an ordinance.[3] The keeper of a floating warehouse is held more strictly.[4]

Burden of proof.— If the bailee shows the cause of injury or the destruction or loss of the goods, and it does not apparently imply negligence on his part, the burden is on the bailor to show negligence.[5] Negligence is not inferred

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[1] Merchants' Trans. Co. v. Story, 50 Md. 4; 33 Am. Rep. 293; but compare Cowles v. Pointer, 26 Miss. 253; Knapp v. Curtis, 9 Wend. 60.

[2] Schwerin v. McKie, 51 N. Y. 180; 10 Am. Rep. 581.

[3] Moore v. Mayor, etc., 1 Stew. 284.

[4] Hamilton v. Elstner, 24 La. Ann. 455. As to the degree of care essential: where whiskey was stored in a building securely locked, but a burglar crawled in at a grain-shoot and bored a hole in the barrel, this was held not negligent; Cincinnati, etc., R. Co. v. McCool, 26 Ind. 140. When the amount is small a night watchman need not be employed; Pike v. Chicago, etc., R. Co., 40 Wis. 583 (but see Madan v. Covert, 42 N. Y. Super. Ct. 135). Under an agreement to store in a fire-proof building, the bailee need not keep fire-extinguishing apparatus; Jones v. Hatchett, 14 Ala. 743. In case of fire, he must remove the goods if possible; Macklin v. Frazier, 9 Bush. 3. He must not leave loose, combustible matter in the building, *ibid.* Ordinarily he is not liable for injury by rats, and keeping cats or a terrier dog is evidence of sufficient care; Cailiff v. Danvers, 1 Peake, 114; Taylor v. Secrist, 2 Disney, 299.

[5] Railroad v. Kelly, 91 Tenn. 699; 30 Am. St. Rep. 902; Mills v. Gilbreth, 47 Me. 320; 74 Am. Dec. 487; Claflin v. Meyer, 75 N. Y. 260; 31 Am. Rep. 467; Willett v. Rich, 142 Mass. 356; 56 Am. Rep. 684; Denton v. Chicago, etc., R. Co. 52 Iowa, 161; 35 Am. Rep. 263. This is the English rule. See note, 24 Am. Dec. 150. The American cases are conflicting and are carefully reviewed in that note, in which the following conclusions are formed: "A bailor seeking to recover from a warehouseman for the non-delivery of goods must prove negligence. When he shows that the goods were not delivered on demand, or were delivered in a damaged condition, he has made a *prima facie* case. If the defendant accounts for the non-delivery or injury by showing that the goods were stolen, or were lost or damaged by fire, or in any other

from the mere occurrence of an accident although consistent with negligence.[1]

Lien.—The warehouseman has a lien for his charges, and any part of the goods is liable for his charges on the whole of any one bailment.[2] The lien does not attach to goods deposited without authority of the owner.[3] It depends upon possession and is lost by surrender, or by acknowledging the ownership of a stranger, or by refusal to deliver to the bailor for other reasons than the lien.[4]

Beginning and termination of liability.—The warehouseman's liability begins at the moment his tackle is applied to lift the goods into the warehouse,[5] or even earlier if he assumes the charge,[6] or it is imposed by custom,[7] and it terminates the moment they leave his premises, as when they are in a pipe discharging into a vessel.[8] If deprived of possession without his fault he

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manner consistent with the exercise of ordinary care on his part, the plaintiff's *prima facie* case is overcome, and he must prove positive negligence occasioning the loss." See Boies v. Hartford & N. H. R. Co. 37 Conn. 272; 9 Am. Rep. 347; Cumins v. Wood, 44 Ill. 416; 92 Am. Dec. 189.

[1] Dennis v. Huyck, 48 Mich. 620; 42 Am. Rep. 479. "While it is true, as a general proposition, that a bailor charging negligence on the part of a bailee, rests under the burden of proof, yet oftentimes slight evidence will shift the burden to the bailee. In an action against a bailee for loss or damage to goods by accident, proof of nature of the accident may afford *prima facie* proof of negligence." Wintringham v. Hayes, 144 N. Y. 1; 43 Am. St. Rep. 725; a case of storage of a yacht.

[2] Schmidt v. Blood, 9 Wend. 268; 24 Am. Dec. 143; Steinman v. Wilkins, 7 W. & S. 466; 42 Am. Dec. 254, and note, 257; Low v. Martin, 18 Ill. 286; Pribble v. Kent, 10 Ind. 326; 71 Am. Dec. 327.

[3] L. R. 9 Ex. 332.

[4] Holbrook v. Wight, 24 Wend. 169; 35 Am. Dec. 607. See note, 42 Am. Dec. 257.

[5] Thomas v. Day, 4 Esp. 262.

[6] Ducker v. Barnett, 5 Mo. 97.

[7] Blin v. Mayo, 10 Vt. 56.

[8] The R. G. Winslow, 4 Biss. 13.

is not bound to pursue the goods.[1] If the goods are taken away without his knowledge by a stranger by mistake, the warehouseman is not liable unless negligent.[2]

Delivery.— He must not deliver except to, or on the order or by the consent of the depositor,[3] but he may surrender in obedience to lawful judicial process.[4] A voluntary or permissive misdelivery renders him liable as for conversion.[5] If the title is disputed, he must surrender on indemnity or bring an action of interpleader.[6] Ordinarily he cannot dispute his bailor's title in an action by him if he still holds the property, but he may surrender to the true owner, and set that up as a defence.[7] If

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[1] Sessions v. West. R. Corp. 16 Gray, 132.

[2] Lichtenhein v. Boston R. Co., 11 Cush. 70.

[3] Velsian v. Lewis, 15 Oregon, 539; 3 Am. St. Rep. 184.

[4] Burton v. Wilkinson, 18 Vt. 186; 46 Am. Dec. 145; notes 24 Am. Dec. 156; Cook v. Holt, 48 N. Y. 275; Edson v. Weston, 6 Cow. 278.

[5] Collins v. Burns, 63 N. Y. 1; Devereux v. Barclay, 2 B. & Ald. 702; Alabama, etc., R. Co. v. Kidd, 35 Ala. 209; Jeffersonville R. Co. v. White, 6 Bush. 251; Bank of Oswego v. Doyle, 91 N. Y. 32; 43 Am. Rep. 634; Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 112; 9 L. R. A. 260; Lichtenhein v. Boston, etc., R. Co., 11 Cush. 70; Dufour v. Mepham. 31 Mo. 577.

[6] Ball v. Liney, 48 N. Y. 6; 8 Am. Rep. 511. See Thorne v. Tilbury, 3 Hurlst. & N. 534.

[7] Hardman v. Willcock, 9 Bing. 382; West. Trans. Co. v. Barber, 56 N. Y. 550. In the latter case the court say: "The right of a bailee to set up title in a third person as against the claim of his bailor has been much considered. It has been said that neither a wharfinger nor a warehouseman can deny the right of the person from or for whom he receives the property. That they are the agents of the persons from whom they receive the property and cannot dispute their title. Edw. Bailm. 305, 306, Story Bailm. §§ 350, 382. This general rule is sustained by numerous cases, a citation of which is unnecessary. It applies in all cases where the bailee seeks to avail himself of the title of a third person for the purpose of keeping the property himself from the bailor, and to all cases where the bailee has not yielded to a paramount title in another. The question in this case is whether it applies in case he has done so. It does not apply where the property has been taken from the bailee by due process of law.

he delivers in conformity with the direction of the party from whom he received the goods, he is protected.[1] An unqualified refusal to deliver on demand is a conversion,[2] but not so unless the refusal is unqualified or the excuse for refusal is unreasonable or in bad faith.[3] The English doctrine, which in the case of a pledge by a symbolical delivery requires an attornment by the ware-

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Story Agency, §§ 211, 249; Bliven v. Hudson R. R. Co., 36 N. Y. 403. Nor where the bailor has obtained possession feloniously or by force or fraud. Bates v. Stanton, 1 Duer, 79; King v. Richards, 6 Whart. 418; 37 Am. Dec. 420. Upon principle I can see no difference. As to the right of the bailee to deliver the property to the true owner upon demand by him, depending upon the mode in which the bailor obtained possession, how can this affect the question? The bailee could not set up the *jus tertii* against his bailor, however tortiously the latter may have acquired possession, unless the owner has claimed the property and the bailee has yielded to the claim. Why may he not set up the right under the same circumstances when the possession of his bailor was lawfully acquired? A bailor can confer upon his bailee no better title than he has himself, except in cases of negotiating bills of lading and like cases. If the owner demands the property of the bailee and he refuses to deliver it to him, he is at once liable to him in an action for its conversion. This is a tort, and it would be somewhat anomalous if the bailee should shield himself from this by delivering the property to the owner, that he could not show such facts as a defence to the groundless claim of the bailor for the property. I think the best considered cases hold that the right of a third person to which the bailee has yielded, by delivering the property, may be interposed in all cases as a defence to an action brought by the bailor subsequently for the property. When the owner comes and demands his property he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not make the performance of this duty tortious as against a bailor having no title. Biddle v. Bond, 6 Best & Smith, 224, was thoroughly considered, and the above conclusions established upon grounds which I think unanswerable. See also White v. Bartlett, 9 Bing. 382, and note *a*; Cheesman v. Exall, 6 Exch. 341; Dixon v. Yates, 27 Eng. C. L. 87." See also The Idaho, 93 U. S. 575; Mullins v. Chickering, 110 N. Y. 514.

[1] Parker v. Lombard, 100 Mass. 405.

[2] Holbrook v. Wight, *supra*; Ball v. Liney, *supra*.

[3] Rogers v. Weir, 34 N. Y. 363.

houseman, in order to create such a delivery as will support the pledge, does not prevail in this country.[1]

Warehouse receipts.—The warehouseman's liability may be fixed or limited by contract, and it is very commonly done so in receipts which they give for the goods deposited, and which pass from hand to hand by assignment. They are not negotiable at common law.[2]

Wharfingers.—A wharfinger is one who keeps a wharf for the purpose of receiving goods on hire.[3] Delivery on the wharf must be with notice or circumstances implying consent, or in accordance with custom.[4] His responsibility is similar to that of a warehouseman. His duty is to exercise ordinary care.[5] This extends to the condition of the wharf itself, and of the river bottom adjoining it,[6] and to furnish necessary appliances for securing vessels to the wharf.[7] He is bound to give the consignee reasonable notice of the arrival of goods.[8]

The wharfinger has a lien on the goods for his charges, as well as a right of action against the owner personally.[9] This lien, it seems, differs from that of a warehouseman, in that it is not merely specific for the one transaction,

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[1] Conrad v. Fisher, 37 Mo. App. 352; 8 L. R. A. 147.

[2] Notes, 100 Am. Dec. 243; 84 ibid. 750; 42 Am. St. Rep. 48.

[3] Rodgers v. Stophel, 32 Pa. St. 111; 72 Am. Dec. 775; Ross v. Johnson, 5 Burr. 2825.

[4] Gibson v. Inglis, 4 Camp. 72; Cobban v. Downe, 5 Esp. 41.

[5] Ibid.; Blin v. Mayo, 10 Vt. 56; 33 Am. Dec. 175; Cox v. O'Riley, 4 Ind. 368; 58 Am. Dec. 633; Hatchett v. Gibson, 13 Ala. 587; Hemphill v. Cheney, 6 W. & S. 75.

[6] Barrett v. Black, 56 Me. 498; 96 Am. Dec. 497; Barber v. Abendroth, 102 N. Y. 406; 55 Am. Rep. 821; Vroman v. Rogers, 132 N. Y. 169.

[7] Willey v. Allegheny City, 118 Pa St. 490; 4 Am. St. Rep. 608.

[8] Cox v. O'Riley, *supra*.

[9] Wooster v. Blossom, 5 Jones L. 244; 72 Am. Dec. 549.

but general, for the balance of accounts.[1] But it does not cover charges for labor or warehouse room,[2] nor does it attach unless the goods are landed on the wharf.[3] The lien extends to a vessel using the wharf.[4] If the owner sells the goods and pays the wharfinger's charges, giving him notice of the sale, he can acquire no further demand against the vessel.[5]

Banks.—If a deposit is made in a bank to be returned specifically it constitutes a bailment,[6] and if for hire it is subject to the ordinary rules.[7] Deposits of money are presumed general, and to be made special there must be a specific agreement.[8]

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[1] Steinman v. Wilkins, 7 W. & S. 466; 42 Am. Dec. 254; Rex v. Humphrey, 1 McCl. & G. 194; Spears v. Hartley, 3 Esp. 81.

[2] Holderness v. Collinson, 7 B. & C. 212.

[3] Seyds v. Hay, 4 T. R. 260.

[4] The Phebe, Ware, 263.

[5] Barry v. Longmore, 12 Ad. & Ell. 144.

[6] Marine Bank v. Chandler, 27 Ill. 525; 81 Am. Dec. 249; Mut. Acc. Ass'n v. Jacobs, 141 Ill. 261; 33 Am. St. Rep. 302.

[7] First Nat. Bank of Carlisle v. Graham, 100 U. S. 699; 7 Browne's Nat. Bk. Cas. 64.

[8] Dawson v. Real Est. Bank, 5 Ark. 297; Brahm v. Adkins, 77 Ill. 263. See note, 16 L. R. A. 516. See *ante*, p. 8.

CHAPTER VIII.

HIRING FOR LABOR OR SERVICES.

This species of bailment (*locatio operis faciendi*) is where property is entrusted to another to have something done upon or about it, for a reward. Under this head come mechanics who receive property for repairs; banks and other agents who receive paper for collection; persons who receive property for sale, such as auctioneers, factors and brokers; millers who receive grain to be ground; farmers who receive horses for treatment; manufacturers who receive material to be manufactured, and the like. In all bailments of this species the identical property is to be returned in the original or an altered form, or the proceeds of it are to be accounted for, and the work or services are always to be for a reward.

Bailment or sale.—In some cases a question arises whether the transaction is a bailment or a sale, and is determined by the test whether the same property is to be returned or bailee may return other property or an equivalent of the same kind. This question arises frequently in contracts for milling. If grain is delivered to be ground and the same grain is to be returned, it is a bailment; as where wheat is delivered "to be manufactured into flour" at a fixed price per barrel.[1] And so where wheat was delivered "to be ground," the depositor "to be subject to no charge on account of storage," and the receiver "to deliver one barrel of superfine flour for each five bushels of wheat so delivered to be ground," this was held a bailment.[2] But where

[1] Mallory v. Willis, 4 N. Y. 76.

[2] Foster v. Pettibone, 7 N. Y. 433; 57 Am. Dec. 530; Slaughter v. Green, 1 Rand. 3; 10 Am. Dec. 488.

wheat was delivered to a miller on condition that he might mix it with his own and convert it into flour and take the proceeds for his own use, but on demand the depositor should be entitled to the same quantity of wheat or flour as so much wheat would make, or the prevailing price of wheat per bushel in money, this is a sale.[1] An agreement to manufacture engravings and lithographs by a certain day is not a sale, and the manufacturer holds the completed work as a bailee.[2] A contract whereby one is to furnish materials and the other is to add materials and manufacture the whole, is a bailment.[3]

Inception of the contract.—The contract arises on delivery of the goods to the bailee, and he cannot afterwards impose new conditions; as for example, on return of the goods, a condition that any claim for damages by unskillful workmanship must be made within a specified time.[4]

Degree of care.—It has been said that public millers are bound "to the greatest degree of care and diligence" short of the absolute insurance imposed on innkeepers and common carriers.[5] But the generally received and well settled doctrine is that bailees for hire for work or services are bound only to ordinary care and diligence and liable only in case of more than slight neglect or want of skill.[6] The care in keeping must be proportioned to the nature of the property. "A bailee is not expected nor required to take the same care of a bag of oats as of a bag of gold; of

[1] Carlisle v. Wallace, 12 Ind. 252; 74 Am. Dec. 207; Smith v. Clark, 21 Wend. 83; 34 Am. Dec. 213.

[2] Cent. Lith., etc., Co. v. Moore, 75 Wis. 170; 6 L. R. A. 788.

[3] Mack v. Snell, 140 N. Y. 193; 37 Am. St. Rep. 534; Wood v. Orser, 25 N. Y. 348.

[4] Dale v. See, 51 N. J. L. 378; 14 Am. St. Rep. 688.

[5] Wallace v. Canaday, 4 Sneed, 364; 70 Am. Dec. 250.

[6] Leck v. Maestaer, 1 Camp. 138 (ship in dock); Clark v. Earnshaw, 1 Gow, 30 (watch to be repaired); Dale v. See, 51 N. J. L. 378; 14 Am. St. Rep. 688 (silk twist to be dyed); Woodruff v. Painter, 150 Pa. St. 91; 30 Am. St. Rep. 786.

a bale of cotton as of a box of diamonds." Such bailees impliedly contract for ordinary skill in their particular callings. But if the bailor knows the bailee's want of skill he can not expect any more skill than the bailee possesses.[1] The rule of ordinary care has been applied to the owner of a custom sawmill, and to a cotton-ginner,[2] and to a banker.[3]

Liability for hire.—The obligation to pay for the work or services is implied from the employment. In the case of banks making collections the bailment is regarded as one for hire although nothing is directly paid.[4] In case of the loss or destruction of the article without extraordinary fault of the bailee, the bailor must pay the agreed or customary and reasonable reward if the work has been done or the services have been rendered.[5] But if the bailee is at fault he can recover nothing for his work or services, and is liable to an action for damages.[6]

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[1] Jones Bailm. 100: "A man who had a disorder in his eyes, called on a farrier for a remedy, and he applied to them a remedy commonly used for his patients; the man lost his sight and brought an action for damages; but the judge said no action lies, for if the complainant had not himself been an ass he would never have employed a farrier." Ritchey v. West, 23 Ill. 385.

[2] Gleason v. Beers, 59 Vt. 581; 59 Am. Rep. 757; Kelton v. Taylor, 11 Lea, 264; 47 Am. Rep. 284.

[3] Salt Springs Nat. Bank v. Wheeler, 48 N. Y. 492; 8 Am. Rep. 564; Ayrault v. Pac. Bank, 47 N. Y. 570; 7 Am. Rep. 489; Georgia Nat. Bank v. Henderson, 46 Ga. 487; 12 Am. Rep. 590; Drovers' Nat. Bank v. Anglo-American, etc., Co. 117 Ill. 100; 57 Am. Rep. 855; Merch. Nat. Bank v. Goodman, 109 Pa. St. 422; 58 Am. Rep. 728; German Nat. Bank v. Burns, 12 Colo. 539; 13 Am. St. Rep. 247, and note 253. Whether a bank is liable for the fault of a correspondent bank in a distant place in making a collection is a mooted question.

[4] Allen v. Merch. Bank, 22 Wend. 215; 34 Am. Dec. 289; Bank of Utica v. Smedes, 3 Cow. 662; Forster v. Fuller, 6 Mass. 58; Isham v. Post, 141 N. Y. 100; 23 L. R. A. 90; 38 Am. St. Rep. 766.

[5] Gillett v. Mawman, 1 Taunt. 137; Menetone v. Athawes, 3 Burr, 1592.

[6] Denew v. Daverell, 3 Camp. 451.

Lien.—The bailee has a lien for his work or services.[1] The lien subsists as against the owner although the work is done at the instance of one whom the owner has suffered to use the article as his own, and the bailee makes the charge to that person, supposing him the owner;[2] but ordinarily no lien can be imposed except with the owner's knowledge and consent.[3] The bailee has a lien on every part of property delivered on one contract for work on any other part;[4] but for work on a part delivered he can impose no lien on the rest on which he fails to perform the agreed work.[5] The lien may be waived by voluntary surrender of the entire property to the bailor,[6] or by unqualified refusal to delivery to the bailor without putting the refusal on the ground of the lien.[7] The lien is not waived by an agreement upon the amount,[8]

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[1] Hanna v. Phelps, 7 Ind. 21; 63 Am. Dec. 410; Wheeler v. McFarland, 10 Wend. 318; Eaton v. Lynde, 15 Mass. 242; McIntyre v. Carver, 2 W. & S. 392; 37 Am. Dec. 519, and note 522; Grinnell v. Cook, 3 Hill, 485; 38 Am. Dec 663; Shaw v. Ferguson, 78 Ind. 554; Smith v. Meegan, 22 Mo. 150; 64 Am. Dec. 259; Halyard v. Dechelman, 29 Mo. 459; 77 Am. Dec. 585; Lord v. Jones, 24 Me. 439; 41 Am. Dec. 391.

[2] White v. Smith, 15 Vroom. 105; 43 Am. Rep. 347 (wife permitting husband to use her wagon).

[3] Small v. Robinson, 69 Me. 425; 31 Am. Rep. 299.

[4] Morgan v. Congdon, 4 N. Y. 552; Hensel v. Noble. 95 Pa. St. 345; 40 Am. Rep. 659.

[5] Pierce v. Schenck, 3 Hill, 28.

[6] McFarland v. Wheeler, *supra;* Sensenbrenner v. Matthews, 48 Wis. 250; 33 Am. Rep. 809.

[7] Hanna v. Phelps, *supra.* In a note to this case, 63 Am Dec. 413, Mr. Freeman says: "The cases on this question do not seem to be numerous, and among them more or less conflict exists. The rule may be laid down, however, that a person who has a lien on goods, papers and articles of personal property generally, waives it by a general refusal on demand to deliver the articles, accompanied by a claim of title in himself, or by a claim to detain them on other grounds distinct from his lien." Citing cases, *q. v.*

[8] Hanna v. Phelps, *supra;* Mathias v. Sellers, 86 Pa. St. 486; 27 Am. Rep. 723.

but it is waived by agreeing to look to a third person,[1] and by agreeing to give credit for a certain time.[2] The lien is valid as against attaching creditors of the bailor.[3] The lien is discharged by a tender of the amount due.[4]

Burden of proof.—It devolves on the bailee to show that any loss, injury, or failure to return the goods, arises without his fault.[5] Unexplained loss raises a presumption of negligence,[6] and so of a return in a damaged condition.[7] But evidence of a robbery shifts the burden;[8] not so, however, of theft by the bailee's servant.[9] There is no presumption that a bailee of a note for collection was to have compensation, where he was not in that business and was a neighbor and friend of the bailor.[10]

Return and surrender of property.—It is the bailee's duty to return the property on completion of the work or services, or on demand, his charges being paid or tendered. If he refuses, alleging title in a third person, he must stand or fall by the asserted title.[11]

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[1] Bailey v. Adams, 14 Wend. 201.

[2] Fieldings v. Mills, 2 Bosw. 489.

[3] Truslow v. Putnam, 4 Abb. Ct. App. 425.

[4] La Motte v. Archer, 4 E. D. Smith, 46.

[5] Walker v. Parker, 13 Peters, 166; Hillyard v. Crabtree, 11 Tex. 264; Spangler v. Eicholtz, 25 Ill. 297; Conwell v. Smith, 8 Ind. 530.

[6] Cairns v. Robins, 8 M. & W. 258; Reeve v. Palmer, 5 C. B. (N. S.) 84.

[7] Brown v. Schock, 77 Pa. St. 471; Cumins v. Wood, 44 Ill. 416; 92 Am. Dec. 189.

[8] Walker v. Brit. Guar. Ass'n, 18, Q. B. 277; Winthrop Sav. Bk. v. Jackson, 67 Me. 570.

[9] Halyard v. Dechelman, 29 Mo. 459; 77 Am. Dec. 585.

[10] Kincheloe v. Priest, 89 Mo. 240; 58 Am. Rep. 117.

[11] Holbrook v Wight, 24 Wend. 169; 35 Am. Dec. 607.

On the subject of the right of the bailee to dispute the bailor's title the following note, by the author of this book, appended to Biddle v. Bond, 34 L. J. Q. B. 137, in the reprint of that case in 3 English Ruling Cases, 572, is given by permission :

Auctioneers.— An auctioneer is a bailee for hire, under the ordinary responsibilities and entitled to the ordinary

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"A bailee is not permitted to dispute the title of his bailor, but he may show that the bailor has assigned his title to another since the property was intrusted to him. If legally assigned, and the bailee has notice of the fact, the bailee must account to the assignee. The rule that a bailee should not attorn to a stranger does not apply, for the assignee is not a stranger. Roberts v. Noyes, 76 Maine, 590; Marvin v. Ellwood, 11 Paige (New York Chancery), 376.

"It seems to be now well settled that a bailee is estopped from disputing the title of his bailor and setting up the *jus tertii*, unless the bailment has been determined by what is equivalent to an eviction by title paramount; and then he may. Story on Bailment, § 582, 8th edition, note. Citing the principal case and Gerber v. Monie, 56 Barb. 652. So when the goods are taken from a carrier by legal process against a third person, although he is not the true owner. Stiles v. Davis, 1 Black, 101; Wareham Bank v. Burt, 5 Allen, 113; Bliven v. Hudson R. R. Co., 36 N. Y. 403. So where a borrowed horse was taken by government cavalry officers. Watkins v. Roberts, 28 Ind. 167. Where a bailee is held in trover by the real owner and compelled to pay the value of the goods, that is a valid defence to an action by the bailor. Cook v. Holt, 48 N. Y. 275.

"Edwards says (Bailment, § 73): 'For nothing will excuse a bailee from the duty to restore the property to his bailor except he shows that it was taken from him by due process of law, or by a person having the paramount title, or that the title of the bailor has terminated. By surrendering the property on demand to a third party, the bailee assumes the burden of establishing the title he thus acknowledges.' Supported by Bates v. Stanton, 1 Deur, 79; Van Winkle v. U. S. M. S. Co., 37 Barb., 122; Burton v. Wilkinson, 18 Vt. 186; Aubery v. Fiske, 36 N. Y. 47; McKay v. Draper, 27 N. Y. 256; Sinclair v. Murphy, 14 Mich. 392; Osgood v. Nichols, 5 Gray, 420 (auctioneer); Pulliam v. Burlingame, 81 Mo. 111; Roberts v. Stuyvesant Safe Dep. Co., 123 N. Y. 57. 'A bailee cannot avail himself of a third person (though the person be the true owner) for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title.' The Idaho, 93 U. S. 575.

"When property in the custody of a bailee for hire is demanded by third persons, under colour of process, it becomes his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse, and to offer such resistance to the taking, and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would, if it had been demanded and taken under a claim of right to the property by another without legal process. . . . We do not think that the mere

rights of such bailees. If he does not disclose the name of his principal when he sells he may be considered as the vendor himself,[1] even though he is known to the buyer to be selling as auctioneer.[2] It has been held that he is not liable to a mortgagee of the goods if he sells them in ignorance of the mortgage, although the mortgagor's act was fraudulent.[3] But on the other hand it has been held that he cannot justify selling the property of a third person secretly mortgaged by a bailee and by him entrusted to the auctioneer for sale, by good faith and ignorance of the real ownership, and is liable for conversion.[4] He is liable for conversion in selling stolen goods.[5] He is liable to the owner if he returns purchase-money to the purchaser contrary to instructions.[6] If the auctioneer sells goods

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levy of an execution or attachment upon the property by a creditor of the owner while it is in the possession of the tort-feasor is available as a defence or in mitigation.' Roberts v. Stuyvesant, etc., Co., *supra*. That was a case where officers with a search-warrant demanded property in the keeping of the defendant and the latter without demanding to see the warrant, or notifying the plaintiff, who lived near, pointed out the plaintiff's box, and the officers broke it open, and took away bonds, and while they were in possession of the prosecuting government attorney, they were attached by the plaintiff's creditors."

[1] Thomas v. Kerr, 3 Bush. 619; 96 Am. Dec. 262; Schell v. Stephens, 50 Mo. 379; Seemuller v. Fuchs, 64 Md. 217; 54 Am. Rep. 766.

[2] Mills v. Hunt, 20 Wend. 433. So if he sells for less than authorized. Bush v. Cole, 28 N. Y. 261; 84 Am. Dec. 343.

[3] Frizzell v. Rundle & Co. 88 Tenn. 396; 17 Am. St. Rep. 908.

[4] Rogers v. Huie, 1 Cal. 429; 54 Am. Dec. 300; Hoffman v. Carow, 22 Wend. 285.

[5] Montgomery v. Pac. C. L. Bureau, 94 Cal. 284; 28 Am. St. Rep. 122.

[6] Robinson v. Bird, 158 Mass. 357; 35 Am. St. Rep. 495. In this case, Holmes, J., says: "The mere fact that the plaintiffs made a bailment to Mrs. Bryant, and that she mortgaged the goods to Stetson, who took without notice and for value, and directed the present sale, is not such a justification." Citing Hoffman v. Carow, 22 Wend. 285; Hollins v. Fowler, L. R. 7, H. L. 757. "The passage to the contrary in the note to Wilbraham v. Snow, 2 Wms. Saunders, 470; cited in Vincent v. Cornell, 13 Pick. 294, 296; 23 Am.

fraudulently obtained by a purchaser, with constructive notice of the fraud, he is liable for the value to the owner.[1]

An auctioneer has a possession coupled with an interest in goods which he is employed to sell; and may maintain an action against the buyer for goods sold and delivered, although the sale was at the house of a third person and the goods were known to be his property.[2] Even though he has received his fees.[3] So he may sue the purchaser for his fees.[4] He may not set up title in himself when sued for the proceeds,[5] and he cannot plead the title of a third person except by his authority.[6] He has a lien on the goods for his fees.[7]

Factor.—A factor is one whose business it is to receive goods for private sale and to account for the proceeds, for hire. Where he has an option to return the proceeds of the identical goods or of others equivalent, he is not a bailee.[8]

Dec. 683, is a misunderstanding of the Year Books on a matter as to which their doctrine no longer is the law, as everyone knows," etc.

[1] Morrow S. M. Co. v. N. E. Shoe Co., 57 Fed. Rep. 685; 24 L. R. A. 417.

[2] Williams v. Millington, 1 H. Bl. 81; 2 Rev. Rep. 724; 3 Eng. Rul. Cas. 583; Thompson v. Kelley, 101 Mass. 291; 3 Am. Rep. 353; Beller v. Block, 19 Ark. 566; Minturn v. Main, 7 N. Y. 220; Flanigan v. Orull, 53 Ill. 352. "This doctrine stands upon the right of the auctioneer to receive and his responsibility to his principal for the price of the property sold, and his lien thereon for his commissions, which give him a special property in the goods entrusted to him for sale, and an interest in the proceeds." Thompson v. Kelley, above.

[3] Minturn v. Main, above.

[4] Johnson & Miller v. Buck, 35 N. J. L. 338.

[5] Osgood v. Nichols, 5 Gray, 420.

[6] Dodge v. Myer, 61 Cal. 405.

[7] Thompson v. Kelley, above.

[8] Ward v. Brandt; Blood v. Palmer, 11 Me. 414; 26 Am. Dec. 547 See First Nat. Bank of Elgin v. Schween, 127 Ill. 573; 11 Am. St. Rep. 174. But where grain is consigned for storage in an elevator and for sale, the factor may store it in a mass with other grain of the same kind and quality belonging to others, in the absence of contrary instructions.

A person as a factor may be classed who receives goods on exhibition and for sale on commission. So where an artist deposited his paintings with the owner of a gallery for exhibition and sale, on commission, the exhibitor agreeing, in consideration of the privilege of exhibiting the picture, to procure orders for the painter and forego his commission, this was held a case of reciprocal benefit, and the exhibitor was held liable for a negligent injury to the picture by his servant.[1]

The mere possession of goods does not empower the bailee to sell them. As where a diamond broker, procuring diamonds from dealers, "on approval," to show to his customers, and "to be returned on demand," wrongfully sold them, the purchaser got no title.[2] A factor is bound to ordinary care and diligence.[3] He must sell according to the usages of trade, and can not deliver the goods so as to pass title, in satisfaction of his own debt, although the account between him and his principal may be in the factor's favor;[4] but in absence of special instructions he may sell for reimbursement of his advances and have an action for a balance.[5] So he may not pledge the goods for his own debt, even to the extent of his lien.[6] But if he sells the property as his own, the title passes to a purchaser in good faith, especially where the owner permitted the agent to use the property as apparently his own.[7] And where

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[1] Hardegg v. Willards, 12 Misc. (N. Y.), 17.

[2] Davis v. Kobe, 36 Minn. 214; 1 Am. St. Rep. 663; Smith v. Clews, 114 N. Y. 190, 11 Am. St. Rep. 627; 105 N. Y. 283, 59 Am. Rep. 502.

[3] Deshler v. Beers, 32 Ill. 368; 83 Am. Dec. 274.

[4] Benny v. Rhodes, 18 Mo. 147; 59 Am. Dec. 293; Easton v. Clark, 35 N. Y. 225; Parsons v. Webb, 8 Greenl. 38; 22 Am. Dec. 220.

[5] Blackmar v. Thomas, 28 N. Y. 67.

[6] Wright v. Solomon, 19 Cal. 64; 79 Am. Dec. 196; Commercial Bank of Selma v. Hurt, 99 Ala. 130; 19 L. R. A. 701; Rodriguez v. Heffernan, 5 Johns. Ch. 417; McCreary v. Gaines, 55 Tex. 485; 40 Am. Rep. 818.

[7] Dias v. Chickering, 64 Md. 348; 54 Am. Rep. 770 (piano)

plaintiff sent cotton to his agent to forward to the defendants, commission merchants, to be sold for him, and the agent shipped it to defendants in his own name and as his own property, and they in good faith sold it and remitted the proceeds to him, they were not liable to the plaintiff.[1] He may sell in his own name.[2] He may not take payment for goods not in his possession.[3] Ordinarily he may sell on credit,[4] and selling on credit he has implied authority to receive payment.[5] If he sells to himself the principal may elect to affirm or disaffirm.[6] The factor has a lien for advances, charges and commissions,[7] but not when the balance of general account is against him,[8] nor for former transactions as against a transferee of a bill of lading in good faith and for value.[9] He must follow instructions or is guilty of conversion.[10] He must recognize his principal's title in spite of irregular judicial proceedings.[11] To render

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[1] Roach v. Turk, 9 Heisk. 708; 24 Am. Rep. 360.

[2] Baring v. Corrie, 2 B. & Ald. 137; Bryce v. Brooks, 26 Wend. 367.

[3] Higgins v. Moore, 34 N. Y. 417; but authority to sell does not warrant a mortgage, Switzer v. Wilvers, 24 Kans. 384; 36 Am. Rep. 259, and authority to take a note in the name of the principal, the note having been delivered to the principal, does not warrant the agent in receiving payment. Draper v. Rice, 56 Iowa, 114; 41 Am. Rep. 88. Authority to sell in the absence of custom does not authorize a warranty. Pickert v. Marston, 68 Wis. 465; 60 Am. Rep. 876; Herring v. Skaggs, 62 Ala. 180; 34 Am. Rep. 4; Cooley v. Perrine, 12 Vroom. 322; 32 Am. Rep. 210.

[4] McConnico v. Curzen, 2 Call. 358; 1 Am. Dec. 540.

[5] Putnam v. French, 53 Vt. 402; 38 Am. Rep. 682.

[6] Sims v. Miller, 37 S. C. 402; 34 Am. St. Rep. 762.

[7] Davis v. Kobe, above.

[8] McGraft v. Rugee, 60 Wis. 406; 50 Am. Rep. 378.

[9] First Nat. Bank of Batavia v. Ege, 109 N. Y. 120; 4 Am. St. Rep. 431; Conrad v. Atlantic Ins. Co. 1 Peters, 444; Allen v. Williams, 12 Pick. 297.

[10] Hilton v. Vanderbilt, 82 N. Y. 591; Scott v. Rogers, 31 N. Y. 676; but in absence of instructions may exercise his judgment. Conway v. Lewis. 120 Pa. St. 215; 6 Am. St. Rep. 700.

[11] Barnard v. Kobbe, 54 N. Y. 516.

him liable for conversion, demand must be made while the goods or the proceeds are in his hands, or it must be shown that he knew the owner's rights or the want of title in the bailor.[1] This subject is very largely and commonly regulated, and the common law modified, by the modern Factors' Acts, which enable these agents to sell as if they were the real owners in certain cases.[2] A factor sometimes guarantees his sales, under what is termed a *del credere* commission, and then he becomes personally liable as principal debtor at once upon sale.

Forwarders.— These are persons who as a business take goods for the purpose of delivering them to carriers for transportation and delivery. Their business is very generally united with that of warehouseman. A forwarder does not undertake to carry and deliver, but only to employ others to that end.[3] His liability therefore is not that of an insurer, like a common carrier, but in degree like that of a warehouseman or other ordinary bailee for hire.[4] He is not liable for the negligence of those carriers whom he employs to deliver goods.[5] He is bound to receive goods unless he has a good excuse.[6] He must notify the consignee of the shipment to him.[7] He must obey particular instructions for forwarding. If when or-

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[1] Roach v. Turk, 9 Heisk. 708; 24 Am. Rep. 360. See generally, notes, 58 Am. Dec. 158.

[2] Browne on Sales, pp. 16, 17.

[3] Roberts v. Turner, 12 Johns. 232; 7 Am. Dec. 311.

[4] Maybin v. S. C. R. Co., 8 Rich. L. 240; 64 Am. Dec. 753. Hooper v. Wells, Fargo & Co., 27 Cal. 11; 85 Am. Dec. 211.

[5] Stannard v. Prince, 64 N. Y. 300; note 24 Am. Dec. 146. Hooper v. Wells, Fargo & Co., 27 Cal. 111; 85 Am. Dec. 211, merely decides that a forwarder is liable for the negligence of his own agents and servants in his business of forwarding, and if he also undertakes to deliver, for that of the carriers whom he employs.

[6] Maybin v. S. C. R. Co., above.

[7] Railey v. Porter, 32 Mo. 471; 82 Am. Dec. 141.

dered to send by a particular vessel he sends by another he is liable for loss,[1] and if when directed to send by railway he ships by water he is guilty of a conversion.[2]

Collecting agents.—One who receives a demand to collect is held to ordinary skill, care and diligence,[3] and is responsible for the defaults of his agents.[4] As to the liability of banks for the default of their correspondent banks in distant places, the question is considerably mooted.[5]

Brokers.—As has been already seen, the relation of stock-brokers buying stocks for a customer on margins is that of pledgor and pledgee (*ante*, p. 28). Where one puts stocks into the hands of a stockbroker simply for sale, the broker is a factor, subject to his liabilities and having his rights.[6] A broker employed to sell a note cannot give title by pledging it for his own debt. He must have the goods; a sale of goods not in his possession gives him no action for advances thereon nor for commissions.[7]

Banks.—The ordinary relation of bank and depositor is that of debtor and creditor and not that of bailment. But where a bank receives paper for collection in a distant place, the question whether it is responsible for the negligence or default of its correspondent bank or other agent at that place, is variously decided. In England, the Federal courts, and a few of the United States the ques-

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[1] Goodrich v. Thompson, 44 N. Y. 324.

[2] Graves v. Smith, 14 Wis. 5; 80 Am. Dec. 762.

[3] Whitney v. Merch. Union Ex. Co. 104 Mass. 152; 6 Am. Rep. 207; Walker v. Bank of State of N. Y. 9 N. Y. 582.

[4] Dickerson v. Wason, 47 N. Y. 439; 7 Am. Rep. 455; Bradstreet v. Everson, 72 Pa. St. 124; 13 Am. Rep. 665.

[5] See *infra*.

[6] Farwell v. Imp. Trad. Bank, 90 N. Y. 483.

[7] Browne on Sales, "Futures," p. 116; Harvey v. Merrill, 150 Mass. 1; 15 Am. St. Rep. 159.

tion is answered in the affirmative, but in most of the States the contrary is held.[1]

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[1] Mackersy v. Ramsays, etc, 9 Cl. & F. 812; 3 Eng. Rul. Cas. 762, and note, p. 776. The latter is as follows: "The state of the decisions is well summerized in one of the latest cases. First Nat. Bank v. Sprague, 34 Neb. 318; 33 Am. St. Rep. 644; 15 L. R. A. 498, as follows:

"'The Courts, as well as the text-writers differ widely upon the question presented. It is held by the Courts of the United States, New York, New Jersey, Ohio, Indiana, Minnesota, and perhaps others, following the English cases, that where a note or bill is received for collection by a bank, and by it remitted to a correspondent at a distance for presentment and demand, the latter is the agent of the transmitting bank only, which will be liable for the default of its correspondent. This view is also approved by Mr. Daniel in his work on Negotiable Instruments, vol. i. 324. The leading case holding thus is Allen v. Merchants' Bank, 22 Wend. 215; 34 Am. Dec. 289, in which, by a vote of fourteen to ten senators, the opinion of Chancellor Walworth in the same case was overruled, and which has then been followed and approved by the Court of Appeals in numerous cases. It will be observed too that since this rule was adopted by the Supreme Court of the United States, Hoover v. Wise, 91 U. S. 308, dissenting opinions were filed by Justices Miller, Clifford and Bradley. Mr Freeman, in a note to Allen v. Merchants' Bank, 34 Am. Dec. 315, while expressing a preference for the rule above stated, says: 'The preponderance of authority is against the principal case, and in favour of the rule that the liability of a bank, taking a note or bill for collection which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the corresponding bank is the agent, not of the transmitmitting bank, but of the holder, so that the transmitting bank is not liable for the default of the correspondent, when due care has been used in selecting such correspondent. The foregoing proposition is sustained by the following cases: Fabens v. Mercantile Bank, 23 Pick. 330; 34 Am. Dec. 59; Dorchester, etc., Bank v. New England Bank, 1 Cush. 177; Jackson v. Union Bank, 6 H. & J. 121; Citizens' Bank v. Howell, 8 Md. 530; 63 Am. Dec. 714; East Haddam Bank v. Scovil, 12 Conn. 303; Lawrence v. Stonington Bank, 6 Conn. 521; Millikin v. Shapleigh, 36 Mo. 596; 88 Am. Dec. 171; Daly v. Butchers', etc., Bank, 56 Mo. 94; 17 Am. Rep. 663; Ætna Ins. Co. v. Alton City Bank, 25 Ill. 243; 79 Am. Dec. 328; Bank of Louisville v. First Nat. Bank, 8 Baxt. 101; 35 Am. Rep. 691; Guelich v. National St. Bank, 56 Iowa, 434; 41 Am. Rep. 110; Stacy v. Dane Co. Bank, 12 Wis. 629; Tiernan v. Commercial Bank,

Public officers.— Public financial officers, such as treasurers, who receive and disburse the public funds, are in

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7 How. (Miss.) 648; 40 Am. Dec. 83; Bowling v. Arthur, 34 Miss. 41; Mechanics' Bank v. Earp, 4 Rawle, 384; Baldwin v. Bank of Louisiana, 1 L. Ann. 13; 45 Am. Dec. 72; Hyde v. Planters' Bank, 17 La. 560; 36 Am. Dec. 621; Bank of Lindsborg v. Ober, 31 Kans. 599. The doctrine of these cases is expressly approved in Morse on Banking, 3d ed. c. 17. * * *

"'Whatever may have been the reasons arising out of the business methods existing at the time, Allen v. Merchants' Bank, 22 Wend. 215; 34 Am. Dec. 289, was decided, for the rule adopted therein, the reason for such a rule is wanting in view of the present changed conditions. Banks, as a general rule, have now no facilities for making collections at distant points not enjoyed by the business public at large. Formerly they may have enjoyed a monopoly of information relative to location, names, and credits of banks at distant or remote points. To-day, however, business men, by means of the information derived from the press and the numerous directories at their command, may collect their bills through the medium of banks at the place of payment as cheaply, safely, and expeditiously as their local banks.

"'The theory of those cases which hold the remitting bank liable is, that the advantage of exchange between different points is a sufficient inducement for banks to assume the liability sought to be imposed. This may be conceded so far as the inconvenience and costs of collection is concerned, but to us it seems wholly inadequate as a consideration for an implied undertaking to insure against loss on account of the fraud or insolvency of a correspondent.

"'The supreme court of Tennessee, in Bank of Louisville v. First Nat. Bank, 8 Bax. 101; 35 Am. Rep. 691, after a thorough examination of the cases on the subject, summarizes as follows: 'The more reasonable and just construction of the undertaking of the bank in which the bill is deposited for collection is that when the bill is payable at another and distant place, the bank so receiving the bill discharges itself of liability by transmitting the same, in due time, to a suitable and reputable bank or other agent at the place of payment; and in such case it is manifest that a sub-agent must be employed, and the assent of the principal is implied, as it cannot be said that the receiving bank was expected or bound to send one of its own officers to the distant point of payment for the purpose of personally attending to the collection for the very inadequate compensation usually paid to banks for such service.' To the views thus expressed we give our unqualified assent.'

"To the same effect are also Bank v. Cummings, 89 Tenn. 609; 24 Am. St. Rep. 618; Ætna Ins. Co. v. Alton City Bank, 25 Ill. 243; 79 Am. Dec. 328;

some sense bailees, but generally they are made by statute, or held by the courts or by conditions in bonds, responsible in a higher degree than private custodians of money. So although such an officer is exempted from liability where the funds are lost by reason of the act of God or the public enemy,[1] yet he is held liable when the loss is through robbery from his custody by thieves, mobs, riots and other private depredations, or by failure of a bank in which the fund is deposited.[2]

Manuf Nat. Bank v. Continental Bank, 148 Mass. 553; 12 Am. St. Rep. 598.

"This view is very strongly advocated by Mr. Morse (Banks and Banking, 406–417), and he criticises the decision in Allen v. Merchants' Bank at considerable length

"On the other hand, the English rule is followed in Streissguth v. National, etc., Bank, 43 Minn. 50; 19 Am. St. Rep. 213; 7 L. R. A. 363, citing the principal case; German Nat. Bank v. Burns, 12 Colo. 539; 13 Am. St. Rep. 247; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; 13 L. R. A. 241; Simpson v. Waldby, 63 Mich. 439; Titus v. Mechanics' Nat. Bank, 35 N. J. L. 588; Reeves v. State Bank, 8 Ohio St. 465; Wingate v. Merchanics' Bank, 10 Penn. St. 104; Am. Express Co. v. Haire, 21 Ind. 4; 83 Am. Dec. 334; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276 (expressly approving Van Wart v. Wooley, 3 B. & C. 439); and Power v. First Nat. Bank, 61 Mont. 251 (disapproving the principal case),—a very exhaustive review of the authorities. And see note to Allen v. Merchants' Bank, 22 Wend. 215; 34 Am. Dec. 289, 307, and notes to the cases cited above from the American Decisions, American Reports, and American State Reports, and in 7 L. R. A. 856; 13 id. 241; 8 id. 42.

"Mr. Daniel (Neg. Inst. sect. 342) says, approving this latter view: 'Any other rule opens the door to carelessness in the conduct of banking business, which should be conducted with every safeguard to the customer who intrusts his business to the keeping of such agents. If they are averse to dealing with distant and unknown parties, they should decline undertaking the collection or handling of the paper; and if they assume it, they should do so for sufficient compensation, and be held responsible.'"

[1] United States v. Thomas, 15 Wallace, 337.

[2] State v. Moore, 74 Mo. 413; 41 Am. Rep. 322; Ward v. School District, 10 Neb. 293; 35 Am. Rep. 477; Lowry v. Polk County, 51 Iowa, 50; 33 Am.

Telegraph companies.— There was at one time a disposition to hold these liable as common carriers, but the more recent and better doctrine is that they are not common carriers, but only bailees, bound to a high degree of skill and diligence, analogous to that required of carriers of passengers.[1]

Rep. 114; Comrs. v. Lineberger, 3 Mont. 231; State v. Powell, 67 Mo. 935; 29 Am. Rep. 512; State v. Houston, 78 Ala. 576; 56 Am. Rep. 59, and note, 66. A few cases are to the contrary: York County v. Watson, 15 S. C. 1; 40 Am. Rep. 675; Cumberland v. Pennell, 69 Me. 357; 31 Am. Rep. 284, which hold that in the absence of statutory regulation the officer is only liable as at common law.

[1] See *post*, ch. x; Manville v. West. Un. Tel. Co. 37 Iowa, 214; 18 Am. Rep. 18; True v. International Tel. Co. 60 Me. 9; 11 Am. Rep. 156; Western Un. Tel. Co. v. Short, 53 Ark. 434; 9 L. R. A. 744; Western Un. Tel. Co. v. Adams, 75 Tex. 531; 6 L. R. A. 844.

CHAPTER IX.

INNKEEPERS.

An innkeeper is one who keeps a public house for entertainment and lodging of travellers and their horses and attendants, for hire.[1] The character of the house may be indicated by a sign, but no sign is essential,[2] and may be proved by the keeper's declarations, by holding out, and by custom. A boarding-house, a lodging-house, a coffee-house, a railway palace or sleeping car, a steamship, or a restaurant is not an inn although they occasionally or habitually entertain travellers.[3] To constitute an innkeeper the occupation must be his regular and habitual business.[4] The house must be open to all comers.[5] The house may be

[1] Pinkerton v. Woodward, 33 Cal. 557; 91 Am. Dec. 657; Kisten v. Hildebrand, 9 B. Monr. 72; 48 Am. Dec. 416; Howth v. Franklin, 20 Tex. 798; 73 Am. Dec. 218; Cromwell v. Stephens, 2 Daly, 15; note, 35 Am. Dec. 136; note, 7 Am. Dec. 449.

[2] Howth v. Franklin, *supra;* Dickerson v. Rogers, 4 Humph. 179; 40 Am. Dec. 642.

[3] Cases ref. 1, *supra;* Pullman Palace Car Co. v. Smith, 73 Ill. 360; 24 Am. Rep. 258; Clark v. Burns, 118 Mass. 275; 19 Am. Rep. 456; Pullman Palace Car Co. v. Gavin, 93 Tennessee, 53; 42 Am. St. Rep. 902; But *contra*, as to sleeping car, Pullman Palace Car Co. v. Lowe, 28 Neb. 239; 26 Am. St. Rep. 325, and see note, 332; 6 L. R. A. 809. A house is no less an inn because it stands within enclosed grounds, not on a public highway, which are locked at night. Fay v. Pac. Imp. Co. 93 Cal. 253; 27 Am. St. Rep. 198; 16 L. R. A. 188. In the *Lowe* case, *supra*, it was said, however, "that the engagement of the sleeping car company, so far as it goes, is exactly the same as the duties assumed by an innkeeper," and the company was accordingly held responsible for the loss of the passenger's overcoat put into the hands of its porter on the car.

[4] Cases ref. 1, *supra;* Lyon v. Smith, 1 Morris (Iowa), 184; Willard v. Reinhardt, 2 E. D. Smith, 148; Holder v. Soulby, 8 C. B. [N. S.] 254.

[5] Southwood v. Myers, 3 Bush, 681; Wintermute v. Clarke, 5 Sandf. 247.

an inn although it does not furnish keeping for the traveller's horse.[1] The keeper of a lodging-house is not made an innkeeper by furnishing care for the guests' horses.[2] A boarding-house is not converted into an inn by the retailing of spirituous liquors.[3] A refreshment bar, under the same roof and licensed as a hotel, but entered from the street by a separate door, is not an inn.[4] A house may be an inn although it does not furnish strong drink to its guests.[5] One may be an innkeeper *de facto* although he is not licensed as required by statute.[6]

Who are guests.—The liability of the innkeeper depends upon the relation of landlord and guest. Ordinarily a guest is a traveller from another place, staying temporarily, and without any agreement as to price. So one is not a guest who is staying at another inn in the same town and attends a ball at the defendant's inn and there partakes of refreshments sold by a company giving the ball;[7] or who lives in the same town, very near the hotel, and takes a bed there at midnight with a disreputable woman;[8] or who living in the same town, goes to an inn for the purpose of depositing some money, leaves the money, goes away, and does not return for a room until some hours afterward, the clerk meanwhile having absconded with the money.[9] But it has been held that the relation of innkeeper and guests exists if the person entertained "resides away from it" (the inn), "whether

[1] Pinkerton v. Woodward, 33 Cal. 557; 91 Am. Dec. 657.

[2] Parkhurst v. Foster, 1 Salk. 387.

[3] Rafferty v. New B. F. Ins. Co., 3 Harrison, 480; 38 Am. Dec. 525.

[4] Mulliner v. Florence, 3 Q. B. Div. 484.

[5] City of St. Louis v. Siegrist, 46 Mo. 594.

[6] Dickerson v. Rogers, *supra*. See Lord v. Jones, 24 Me. 439; 41 Am. Dec. 391.

[7] Carter v. Hobbs, 12 Mich. 52; 83 Am. Dec. 762.

[8] Curtis v. Murphy, 63 Wis. 4; 53 Am. Rep. 242.

[9] Arcade Hotel Co v. Wiatt, 44 Ohio St. 33; 58 Am. Rep. 785.

far or near, and comes to it for entertainment as a traveller and receives it as such."[1]

One who engages certain rooms at an inn, for a specified term, and at an agreed price, becomes a boarder, toward whom the innkeeper does not stand in the responsibility of an insurer. Regular boarders by the week, who are in no sense travellers, are not guests,[2] especially when terms to them are less than to transient guests. But one is no less a guest because the price by the day or week or month is fixed beforehand by agreement, nor merely because his stay is greatly prolonged. The test probably is his right to leave at pleasure without liability beyond the time that he stays.[3] In the leading case in New York (*Hancock* v. *Rand*), the court said: "The fair intendment from the evidence is that General Hancock did not go to defendant's hotel under a contract hiring the rooms for a season, but that he was a transient person who had the right to leave at any moment, the same as any other guest."

How one becomes a guest.— It was early held that one who commits his horse to an innkeeper to be fed, is a guest,

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[1] Manning v. Wells, 9 Humph. 746. Absence from home, whether on business or for pleasure, constitutes a traveller. Atkinson v. Sellers, 5 C. B. [N. S.] 442.

[2] Johnson v. Reynolds, 3 Kans. 257; Manning v. Wells, 9 Humph. 746; 51 Am. Dec. 688; Lusk v. Belote, 22 Minn. 468; Moore v. Long Beach, etc. Co. 87 Cal. 483; 22 Am. St. Rep. 265, Mowers v. Fethers, 61 N. Y. 34, 19 Am. Rep. 244; Singer Manuf. Co. v. Miller, 52 Minn. 516; 38 Am. St. Rep. 568; Vance v. Throckmorton, 5 Bush. 41; 96 Am. Dec. 327.

[3] Hancock v. Rand, 94 N. Y. 1; 46 Am. Rep. 112; Pinkerton v. Woodward, 33 Cal. 557; 91 Am. Dec. 657; Berkshire Woolen Co. v. Proctor, 7 Cush. 417; Norcross v. Norcross, 53 Me. 169; Walling v. Potter, 35 Conn. 183; McDaniels v. Robinson, 26 Vt. 316; 62 Am. Dec. 574; Allen v. Smith, 12 C. B. (N S.), 638; Hall v. Pike, 100 Mass. 495; Jalie v. Cardinal, 35 Wis. 118; Fay v. Pac. Imp. Co. 93 Cal. 253; 27 Am. St. Rep 198; 16 L. R A. 188. See notes 62 Am. Dec. 586; 42 Am. Rep. 119.

although he may not eat or lodge at the inn.[1] But the weight of modern adjudication is decidedly to the contrary, and with reason.[2] The modern doctrine is that simply leaving property in the inn or using the inn without incurring liability to pay for it, does not raise the relation of landlord and guest. There must be a liability of the traveler for personal attention, by reason of which the host's liability for his goods and horses follows as an incident; but in the absence of that, the host is not under the stringent liability of an innkeeper, but only under that of an ordinary bailee for keeping or hire. The owner of the property need not however be personally within the inn; it is sufficient if his wife, children or servants are there.[3] Lodging is not essential. It has been held that purchasing liquor at an inn constitutes one a guest.[4] So of putting up a horse, laying aside garments, and taking dinner, without more.[5]

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[1] Mason v. Thompson, 9 Pick. 280; 20 Am. Dec. 471; McDaniels v. Robinson, 26 Vt. 316; 62 Am. Dec. 574; York v. Grindstone, 1 Salk. 388; Thickstun v. Howard, 8 Blackf. 535; Peet v. McGraw, 25 Wend. 653.

[2] In Grinnell v. Cook, 3 Hill, 485; 38 Am. Dec. 663, Bronson, J., said the opinion in York v. Grindstone was a *dictum*, against the opinion of Lord Holt; that the doctrine of Mason v. Thompson "is little short of a downright absurdity;" and in Ingallsbee v. Wood, 33 N. Y. 577; 88 Am. Dec. 409, it was said that it was decided under a misapprehension of the law, "and it is doubtful if any court would now so decide." So keeping a stallion at an inn on certain days for serving mares, under an agreement for the season, does not render the keeper liable as an innkeeper. Mowers v. Fethers, 61 N. Y. 34; 19 Am. Rep. 244. See Lynar v. Mossop, 36 U. C., Q. B. 231. To the same effect, Healey v. Gray, 68 Me. 489; 28 Am. Rep. 80; Binns v. Pigot, 9 C. & P. 208; Hickman v. Thomas, 16 Ala. 666; Towson v. Havre de Grace Bank, 6 H. & J. 47; 14 Am. Dec. 254. See notes, 7 Am. Dec. 451; 62 id. 586.

[3] Berkshire Woolen Co. v. Proctor, *supra*.

[4] McDonald v. Edgerton, 5 Barb. 560. *Contra:* Mulliner v. Florence, 3 Q. B. Div. 484, the bar being a part of the hotel, but entered from the street by a separate door, and the drinker living within twelve hundred yards.

[5] Read v. Amidon, 41 Vt. 15; 98 Am. Dec. 560.

When one becomes a guest.—One becomes a guest by entering the inn and registering his name, and so by entering and depositing property there or in the stable, with the intention afterward executed, of eating or lodging in the house. The innkeeper's liability attaches also when the traveler gives his baggage check to his porter at the railway station and takes a stage indicated by him for the house.[1]

When one ceases to be a guest.—One does not cease to be a guest by any temporary absence, as by going out to dine with a friend.[2] But if the guest pays his bill and departs, having his name stricken from the register, but leaves his property, intending to return and become a guest again, the landlord is not responsible for it in his absence, except as an ordinary bailee. "The right to charge is the criterion of the innkeeper's liability. When the liability of the guest to be charged as such ceases, his claim on the innkeeper as such expires, subject only to the right to hold him responsible for the baggage of the guest for such time as may be reasonable to effect a removal, to be determined by circumstances."[3] In such cases

[1] Coskery v. Nagle, 83 Ga. 696; 20 Am. St. Rep. 333; 6 L. R. A. 483; Dickinson v. Winchester, 4 Cush. 114; 50 Am. Dec. 760.

[2] Grinnell v. Cook, *supra*; McDaniels v. Robinson, *supra*.

[3] Miller v. Peeples, 60 Miss. 819; 45 Am. Rep. 423; Whittemore v. Haroldson, 2 Lea, 312, clerk embezzling money left with him after guest paid and left; Lawrence v. Howard, 1 Utah, 142, guest notified to leave on account of non-payment, and leaving his baggage; Glenn v. Jackson, 93 Ala. 342; 12 L. R. A. 382, valise checked by porter without authority on guest's paying and leaving; Murray v. Marshall, 9 Colo. 482; 59 Am. Rep. 152, similar to last case. In all these cases the liability is that of an ordinary bailee for negligence and not for theft or loss without negligence. And so where the guest pays and departs, announcing that he will be gone a few days, and will leave his baggage to be cared for until his return. O'Brien v. Vaill, 22 Fla. 627; 1 Am. St. Rep. 219; McDaniels v. Robinson, *supra*. And the landlord is not liable as such, for baggage left with him as security for money lent, by a guest who has severed his connection with the inn. Coskery v. Nagle, *supra*.

the host's liability as an ordinary bailee continues for a reasonable time for the guest to return and get his property. But the innkeeper's stricter liability as innkeeper continues for a reasonable time after the guest has paid his bill to enable him to get his effects away from the inn, as where the guest told the clerk that a certain person would call for her trunk in a few minutes, and he assented;[1] or where valuables entrusted to the innkeeper are given back by him to the guest for packing, and lost before his departure;[2] or the guest puts his trunk in his locked room in charge of the clerk, handing him the key;[3] or while hitching up his horses one of them is injured by another horse;[4] or where he leaves at noon and directs the innkeeper to send his trunk to the four o'clock boat, and it is lost by sending to the wrong boat;[5] or where the innkeeper sends his trunk by the porter to the cars and it is lost before delivery to the guest at the station.[6]

Whom the innkeeper is bound to receive.—The innkeeper is bound to receive, up to the capacity of his house, all well conducted persons who apply for temporary accommodation and offer to pay his reasonable charges.[7] He may demand pay in advance; certainly if they have no effects with them. He is not bound to receive boarders nor to furnish stable accommodations. He may not refuse to receive a member of a military company because some other members received as guests on the same occasion had

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[1] Adams v. Clem, 41 Ga. 65; 5 Am. Rep. 524; Seymour v. Cook, 53 Barb. 451; Maxwell v. Gerard, 84 Hun, 537.

[2] Bendetson v. French, 46 N. Y. 266.

[3] Stanton v. Leland, 4 E. D. Smith, 88.

[4] Seymour v. Cook, 53 Barb. 451.

[5] Giles v. Fauntleroy, 13 Md. 126.

[6] Sasseen v. Clark, 37 Ga. 242; Richards v. London, etc., R. Co., 7 Man., G. & Scott, 839.

[7] Rex v. Ivens, 7 C. & P. 213; so refusing, he is indictable; Reg. v. Rymer, 2 Q. B. Div. 136; 19 Moak's Eng. Rep. 261.

misconducted.[1] He may refuse to admit persons who propose merely to carry on or solicit business in the inn, or having admitted them may expel them at any time,[2] and he may give exclusive business privileges inside the inn to such persons as he choose.[3] He may eject a disorderly, disreputable or irresponsible person or refuse to receive him.[3] He is liable to an action for not receiving, and also to indictment.[4]

Duty of innkeeper toward person of guest.—The innkeeper is bound to protect the guest from insults and assaults by his servants, and also by persons whom he entertains or harbors.[5] And he is liable in damages if he knowingly exposes him to small-pox in the inn,[6] or drives a sick person out of the inn without covering in a severe storm, although intoxicated and troublesome, and he perishes from the exposure.[7]

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[1] Atwater v. Sawyer, 76 Me. 538; 49 Am. Rep. 634.

[2] State v. Steele, 100 N. C. 766; 8 L. R. A. 516; 19 Am. St. Rep. 573. "He is not in his capacity of innkeeper bound to receive or furnish accommodations for persons desirous of exposing their commodities for sale, or bound to permit his establishment to be made a depot for the propagation of horses." Mowers v. Fethers, 61 N. Y. 34; 19 Am. Rep. 244.

[3] Howell v. Jackson, 6 C. & P. 723; McKee v. Owen, 15 Mich. 115; Markham v. Brown, 8 N. H. 523; 31 Am. Dec. 209; Com. v. Power, 7 Metc. 596; Curtis v. Murphy, 63 Wis. 4; 53 Am. Rep. 242. As where the person brings large dogs with him, to the annoyance of guests and against the innkeeper's protest. Mulliner v. Florence, 3 Q. B. Div. 484.

[4] Boson v. Sandford, 1 Shower, 29; Rex v. Ivens, 7 C. & P. 213.

[5] Rommel v. Schambacher, 120 Pa. St. 579; 6 Am. St. Rep. 732.

[6] Gilbert v. Hoffman, 66 Iowa, 205; 55 Am. Rep. 263.

[7] McHugh v. Schlosser, 159 Pa. St. 480; 39 Am. St. Rep. 699; 23 L. R. A. 574. In this case the court said: "The learned judge was asked to instruct the jury, in substance, that if the deceased was troublesome to the defendants, and annoying to their guests, they might rightfully put him out of their house, if they used no unnecessary force or violence. This point was refused as framed, but the learned judge proceeded to state the rule thus: 'If the annoying acts were willful, the defendants could remove decedent in the

Liability for loss of or injury to guest's property.—The innkeeper is responsible for the safe-keeping and return of the guest's property confided to his care, except in case of loss or injury by the act of God or of the public enemies, or of the guest or his servants, and inevitable accident. Such is the doctrine of many if not most of the modern authoritative cases,[1] although some of the early cases

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manner stated in point. If however they were the result of sickness, although they might, under certain circumstances, remove him, such removal must be in a manner suited to his condition.' This was saying that if McHugh was intoxicated, and the disturbances made by him were due to his intoxication, he might be treated as a drunken man; but if he was sick, and the disturbances caused by him were due to his sickness, he must be treated with the consideration due to a sick man. This is a correct statement of the rule. In the delirium of a fever a sick man may become very troublesome to a hotel keeper, and his groans and cries may be annoying to the occupants of rooms near him; but this would not justify turning him forcibly from his bed into the street during a winter storm. What the condition of the decedent really was went properly to the jury for determination. If they found the fact to be that he was suffering from sickness, then the learned judge properly said that if his removal was to be undertaken, it should be conducted in a manner suited to one in his condition. The question which the defendants were bound to consider before putting the decedent out in the storm was not whether such exposure 'would' surely cause death, but what was it reasonable to suppose might follow such a sudden exposure of the decedent in the condition in which he then was. What were the probable consequences of pushing a sick man, in the condition the decedent was in, out into the storm, without adequate covering, and when he fell, from inability to stand on his feet, leaving him to lie in the stream of melting ice and snow that ran over the pavement of the alley, for about a half hour in all, in the condition in which Officer White found him?"

[1] 2 Kent Com. 593; Bennett's note, Story Bailm. § 465; 2 Pars. Cont. 146; 2 Story Cont. § 909; Chitty Cont. (11 Am. ed.), 675; Saunders Neg. 212; Clute v. Wiggins, 14 Jonns. 175; 7 Am. Dec. 448; Hulett v. Swift, 33 N. Y. 571; 88 Am. Dec. 405; Mateer v. Brown, 1 Cal. 221; Shaw v. Berry, 31 Me. 478; 52 Am. Dec. 628; Mason v. Thompson, 9 Pick. 280; 20 Am. Dec. 471; Norcross v. Norcross, 53 Me. 169; Burrows v. Trieber, 21 Md. 320; 83 Am. Dec. 590; Manning v. Wells, 9 Humph. 746; 51 Am. Dec. 688; Thickstun v. Howard, 8 Blackf. 535; Sasseen v. Clark, 37 Ga. 242; Pinkerton

and text writers and some modern ones hold him only to a very high degree of care and relieve him in cases of robbery, fires and the like.[1] The original liability

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v. Woodward, 33 Cal. 557; 91 Am. Dec. 657; Fay v. Pacific Imp. Co. 93 Cal. 253; 27 Am. St. Rep. 198; Pettigrew v. Barnum, 11 Md. 434; 69 Am. Dec. 212; Shultz v. Wall, 134 Pa. St. 262; 8 L. R. A. 97; 19 Am. St. Rep. 686; O'Brien v. Vaill, 22 Fla. 627; 1 Am. St. Rep. 219; Sibley v. Aldrich, 33 N. H. 553; 66 Am. Dec. 745; Oppenheim v White Lion Hotel Co., L. R., 6 C. P. 515; Neal v. Wilcox, 4 Jones Law, 146; 67 Am. Dec. 266.

[1] Johnson v. Richardson, 17 Ill. 302; 63 Am. Dec. 369; Howth v. Franklin, 20 Tex. 798; 73 Am. Dec. 218; McDaniels v. Robinson, 28 Vt. 387; 67 Am. Dec. 720; Read v. Amidon, 41 Vt. 15; 98 Am. Dec. 560; Kisten v. Hildebrand, 9 B. Monr. 72; 48 Am. Dec. 416; Cutler v. Bonney, 30 Mich. 259; 18 Am. Rep. 127; Laird v. Eichold, 10 Ind. 212; 71 Am. Dec. 323; Dawson v. Chamney, 5 Ad. & Ell. [N. S.] 164; Story Bailm. § 742; Whart. Neg. § 678; 1 Add. Torts, § 684.

The reasons for the former rules have been expressed as follows in Hulett v. Smith, *supra:*

"The considerations of public policy in which the rule had its origin forbid any relaxation of its rigor. The number of travelers was few when this custom was established for their protection. The growth of commerce and increased facilities of communication have so multiplied the class for whose security it was designed that its abrogation would be the removal of a safeguard against fraud, in which almost every citizen has an immediate interest. The rule is in the highest degree remedial. No public interest would be promoted by changing the legal effect of the implied contract between the host and the guest, and relieving the former from his common-law liability. Innkeepers, like carriers and other insurers, at times find their contracts burdensome; but in the profits they derive from the public, and the privileges accorded to them by the law they find an ample and liberal compensation. The vocation would be still more profitable if coupled with new immunities; but we are not at liberty to discard the settled rules of the common law, founded on reasons which still operate in all their original force. Open robbery and violence, it is true, are less frequent as civilization advances; but the devices of fraud multiply with the increase of intelligence, and the temptations which spring from opportunity keep pace with the growth and diffusion of wealth. The great body of those engaged in this, as in other vocations, are men of character and worth; but the calling is open to all, and the existing rule of protection should therefore be steadily maintained. It extends to every case, and secures the highest vigilance on the part

was undoubtedly that of an insurer from the necessity of the situation. In the early days of the common law the

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of the innkeeper by making him responsible for the property of his guest. The traveler is entitled to claim security for his goods as against the landlord, who fixes his own measure of compensation, and holds the property to pledge for the payment of his charges against the owner.

"In cases of loss, either the innkeeper or the guest must be the sufferer; and the common law furnishes the solution of the question on which of them it should properly fall. In the case of Cross v. Andrews, Cro. Eliz. 622, the rule was tersely stated by the court: 'The defendant, if he will keep an inn, ought, at his peril, to keep safely his guests' goods.' He must guard them against the incendiary, the burglar and the thief; and he is equally bound to respond for their loss, whether caused by his own negligence, or by the depredations of knaves and marauders, within or without the curtilage.

"This doctrine is too well settled in the English courts to be shaken by the exceptional case on which the appellant relies: Calye's case, 8 Coke, 32; Cross v. Andrews, Cro. Eliz. 622; Richmond v. Smith, 8 Barn. & C. 144; Cashill v. Wright, 6 El. & Bl 891.

"A shade of doubt has at times been thrown over the question by the unguarded language of elementary writers, and especially by the suggestion of Judge Story in his treatise on the law of bailments that the innkeeper could exonerate himself from liability by proving that he was not guilty of actual negligence; and this view seems to have been adopted in two of the Vermont and one of the English cases: Story on Bailments, sec. 472; Dawson v. Chamney, 5 Ad. & E. [N. S.] 164; Merritt v. Claghorn, 23 Vt. 177; McDaniels v. Robinson, 28 id. 337; 67 Am. Dec. 720. The doctrine of these cases is opposed to the general current of English and American authority, and evidently has its origin in a misapprehension of the rule as stated by the Judges in Calye's case, 8 Coke, 32. It is true that the liability of the innkeeper, by the custom of the realm was not unlimited and absolute, and that the loss of the goods of the guests was merely presumptive evidence of the default of the landlord. But this presumption could only be repelled by proof that the loss was attributable to the negligence or fraud of the guest, or to the act of God or the public enemy. No degree of diligence or vigilance on the part of the inkeeper could absolve him from his common-law obligation for the loss of his guest, except traceable to one of these exceptional causes: Shaw v. Berry, 31 Me. 478; 52 Am. Dec. 628; Sibley v. Aldrich, 33 N. H. 553; 66 Am. Dec. 745. The rule is salutary, and should be steadily and firmly upheld, subject to the statutory regulations for the protection of hotel proprietors from fraud and negligence on the part of their guests."

inns were infested by robbers and thieves who throve by plying their occupation there, or on the highways, and the innkeepers were frequently in league with them, and it was necessary to hold innkeepers to an absolute and unrestricted liability in order to procure any safety for the traveller's goods. "The rule is founded," says Chief Justice Shaw, "on the expediency of throwing the risk on those who can best guard against it."[1] In recent times this necessity has almost entirely passed away, at least in the older and orderly communities, and the ancient liability

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On the other hand, in Cutler v. Bonney, *supra*, the court said (citing Calye's case, 8 Co. 32): "But we are not prepared to assume that there is any policy which will compel persons who are in wise in fault to respond in damages, where the law is not clear against them." "We have found no decision holding innkeepers liable for losses by purely accidental casualties." "These writers, or at least such of them as are of recognized authority, have drawn a line between carriers and innkeepers, resting on the distinction between absolute and qualified responsibility." "And the authorities directly in point on losses by fire are not numerous, and do not, in our judgment, call for any such consequences. The doctrine imposing such a liability may be said to rest entirely on what was said by Justice Porter, in Hulett v. Swift, 33 N. Y 571. In that case the subject is discussed at some length and with much ability. But no foundation is shown there for the doctrine asserted, beyond remarks which are confessedly opposed to the text-books, and which were foreign to what was actually decided in the cases in which they were found. The whole opinion of the learned judge is open to the same criticism, as he himself declares the point discussed did not really arise, inasmuch as no proof was introduced changing the presumption raised by law against the defendant. The opinion was not unanimous, and the dissent of Judge Denio would detract much from its force, even if it had been pertinent to the facts." The court cite and approve Merritt v. Claghorn, 23 Vt. 177.

[1] Nowhere can a more correct and vivid idea of the unsafety of inns two or three centuries ago be obtained than in Charles Reade's "The Cloister and the Hearth." Judge Porter was probably fresh from the perusal of that great novel when he wrote the opinion in Hulett v. Swift. Dumas, in "Twenty Years After," speaks of innkeepers as "that particular class of society, which when there were robbers on the highway was associated with them, and since there are none has advantageously replaced them."

has been by statutes in England and most of the United States reduced to the exercise of a high degree of care, and the innkeeper is absolved from the consequences of fire and of robbery without his fault.

But even the cases which deny the liability of an insurer hold the innkeeper to an ordinary measure of care, and put on him the burden of showing it in explanation of a loss or injury.[1] Some cases exact extreme care and diligence.[2] And they admit the responsibility of the innkeeper for goods of the guest entrusted expressly or impliedly to his care.[3]

When and to what things the liability attaches.—As has been shown above, the liability attaches when the goods come expressly or impliedly under the charge of the innkeeper, but only when their owner is a guest.[4] So an innkeeper in whose safe a regular boarder deposits money for safe-keeping is only bound to ordinary care where his night clerk steals it. It may attach even before the goods come into the house, as where given to the house porter at a railway station. It is sufficient if they are within the inn, and the responsibility extends to every part of the house, where such things are customarily taken.[5] As where a sleigh loaded with grain was put into an appurtenant out-house where such goods were usually placed.[6] But it is otherwise when a wagon is placed in a shed in an open yard,

[1] See cases above, ref. 1, p. 81, Houser v. Tully, 62 Pa. 92, 1 Am. Rep. 390; Hill v. Owen, 5 Blackf. 323; 35 Am Dec. 124, Newson v. Axon, 1 McCord, 509; 10 Am. Dec. 685; Dunbier v. Day, 12 Neb. 596, 41 Am. Rep. 772, and note, 67 Am. Dec. 268.

[2] Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218.

[3] Weisenger v. Taylor, 1 Bush. 275; 89 Am. Dec. 626.

[4] Taylor v. Downey, Mich. Sup. Ct.; 62 N. W. Rep. 716.

[5] Epps v. Hinds, 27 Miss. 657; 61 Am. Dec. 528 (money stolen from guest's room); Burrows v. Trieber, *supra*.

[6] Clute v. Wiggins, 14 Johns. 198, 7.

even by the innkeeper's consent.[1] And the innkeeper is absolved if the guest takes the exclusive charge and control of his own goods.[2] And so he is not responsible for clothes of the guest taken off by the guest while bathing at a sea bathing-house kept by the same landlord separate from the inn.[3] Unless by statute. the guest is not bound to deposit his valuables in the immediate custody of the innkeeper, although he knows a safe is provided for that purpose.[4] The innkeeper is responsible for the goods of a peddler, although ignorant of their contents, and the owner was too drunk to take proper care of them.[5] But the innkeeper is not responsible for the goods of the guest when he exposes them in the house for the purpose of sale,[6] although he is responsible for those which the guest buys outside and brings into the house after his arrival.[7] The inn-keeper may lawfully object to receiving goods that are offensive, injurious, extremely bulky, or perishable.[8] But if he receives such he becomes responsible, as for example, cattle.[9] The general rule is that for whatever the guest brings within the inn, without limit as to kind or amount, the

[1] Albin v. Presley, 8 N. H. 408; 29 Am. Dec. 679.

[2] Vance v. Throcmorton, *supra;* Weisenger v. Taylor, 1 Bush. 275; 89 Am. Dec. 626; Fuller v. Coats, 18 Ohio St. 343; Calye's case, 8 Co. 32; Hawley v. Smith, 25 Wend. 642. But merely giving the guest's servant the key of a stable in which his horse has been put, the stable being otherwise open and insecure, does not absolve the innkeeper from liability for the theft of the horse. Newson v. Axon, *supra.*

[3] Miner v. Staples, 71 Me. 316; 36 Am. Rep. 318.

[4] Johnson v. Richardson, *supra.*

[5] Rubenstein v. Cruikshanks, 54 Mich. 199; 52 Am. Rep. 806.

[6] Burgess v. Clements, 4 M. & S. 306; Myers v. Cottrell, 5 Biss. 465; Neal v. Wilcox, *supra.*

[7] Needles v. Howard, 1 E. D. Smith, 54 (laces).

[8] Cases 6, 7, *supra;* Queen v. Rymer, 2 Q. B. Div. 136; Howe Machine Co. v. Pease, 49 Vt. 477.

[9] Hilton v. Adams, 71 Me. 19.

landlord becomes responsible.[1] This was the common-law rule. But in some states this has been relaxed by the courts, and the innkeeper has been held only for ordinary baggage, suitable to the station of the guest and the necessities of the journey.[2]

Contributory negligence.—The innkeeper is not liable for loss of the goods of the guest, if it is occasioned by want of ordinary care on the part of the guest, such as may be expected of a prudent man in the circumstances; and whether this has been exercised is a question for a jury.[3] Opening and counting money in the dining room is not necessarily negligent.[4] And so of neglecting to bolt the

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[1] Armistead v. Wilde, 17 Q. B. 261; Kent v. Shuckard, 2 B. & Ad. 186; Burkshire Woolen Works v. Proctor, *supra;* Sasseen v. Clark, 37 Ga. 242; Kellogg v. Sweeney, 1 Lans. 397; Quinton v. Courtney, 1 Hayw. 40 (money in saddle-bags; Walsh v. Porterfield, 87 Pa. St. 376 (diamond pin). The liability is not limited to money necessary for traveling expenses. Smith v. Wilson, 36 Minn. 334; 1 Am. St. Rep. 669.

[2] Pettigrew v. Barnum, 11 Md. 434; 69 Am. Dec. 212 (not liable for silver knives, forks and spoons); Sasseen v. Clark, 37 Ga. 242; Giles v. Fauntleroy, 13 Md. 126 (not liable for a pistol and spoons). A reasonable amount of money in a trunk is covered. Noble v. Milliken, 74 Me. 225; 43 Am. Rep. 581 (forty dollars); Van Wyck v. Howard, 12 How. Pr. 152 (four hundred and fifty dollars for a traveler from Europe); Murchison v. Sergent, 69 Ga. 206 (five hundred dollars and a gold watch). So of a watch, chain and jewels. Maltby v. Chapman, 25 Md. 310.

[3] Hadley v. Upshaw, 27 Tex. 547; 86 Am. Dec. 654; Read v. Amidon, *supra;* Burrows v. Treiber, *supra;* Johnson v. Richardson, *supra.* In Shultz *v.* Wall, 134 Pa. St. 262; 19 Am. St. Rep. 686, the court said: "And however it might have been in the days of good Queen Bess, when Calye's case, 1 Smith's Lead. Cas. 197, was decided, and when the length of his wine bill might have been deemed sufficient consideration for the duty of an innkeeper to take care of his guest, drunk or sober, it is now held in our own case of Walsh v. Porterfield, 87 Pa. St. 376, that intoxication is no excuse for the negligence of a guest which contributed to his loss."

[4] Dunbier v. Day, *supra;* Armistead v. Wilde, 17 Q. B. 261.

door of his room;[1] it is a question of fact. And so of retaining $495 on his person, although the bolt could be opened by a wire from the outside.[2] But his failure to deposit his valuables in a safe, after request to do so, and to secure the fastenings of his room is evidence of negligence.[3] And delivering as ordinary baggage a valise containing $6,300 worth of jewelry is negligence.[4] The guest may retain his personal valuables in his own keeping and still hold the innkeeper liable for them.[5] The landlord however may require the guest to deposit his goods in a designated place, and if he fails to comply, the former is held only to ordinary care; but the notice must be personal, and does not extend to property carried upon the person, necessary baggage, and a reasonable amount of money.[6]

Statutory provisions.—Statutes have been enacted in some of the States in order to relieve the innkeeper from the excessively strict degree of liability to which he was bound at common law, and to conform the remedies of the guest to the changed condition of travel and the improved character of inns in modern days. In New York, growing out of the decision in *Hulett* v. *Swift*, *supra*, holding the innkeeper an insurer even against an accidental fire occurring without his fault, a statute was enacted enabling the

[1] Note 41 Am. Rep. 777; Spring v. Hager, 145 Mass. 186; 1 Am. St. Rep. 451; Shulz v. Wall, *supra;* Murchison v. Sergent, 69 Ga. 206; 47 Am. Rep. 754.

[2] Smith v. Wilson, 36 Minn. 334; 1 Am. St. 669.

[3] Shulz v. Wall, *supra*.

[4] Elcox v. Hill, 98 U. S. 218.

[4] Fay v. Pac. Imp. Co., *supra*.

[5] Faucett v. Nichols, 64 N. Y. 377.

[6] Fuller v. Coates, 18 Ohio St. 343; Wilson v. Halpin, 1 Daly, 496 (but see Packard v. Northcraft, 2 Met. 439); Purvis v. Coleman, 21 N. Y. 111; Johnson v. Richardson, *supra;* Kellogg v. Sweeney, 1 Lans. 397; Bodwell v. Bragg, 29 Iowa, 232; Pope v. Hall, 14 La. Ann. 324.

innkeeper to avoid that liability, as to goods in a barn or outbuilding, by showing that the fire was of incendiary origin and without his fault. Statutes have also been passed in New York and some other States requiring the innkeeper to provide a safe for the reception of the guest's valuables, and to post notices in all the rooms, drawing attention to the fact and notifying the guest to deliver them for deposit therein, and in default of the guest's compliance relieving the innkeeper from any care thereof beyond that of an ordinary bailee.[1] The common-law lia- liability still subsists for goods not enumerated in the statutes and to all which are then deposited. The innkeeper then becomes liable for any amount of money so deposited, even $20,000 in a sealed package having no indication of the amount.[2] The guest is bound to deposit all his money, without reservation for expenses, in order to be protected,[3] but he may reserve his watch and chain, they not being "jewels or ornaments."[4] Personal notice to the guest of the safe and request to deposit his valuables in it is equivalent to posting notice.[5] If the innkeeper relies on constructive notice by posting, he must show a precise compliance with the statute.[6] An

[1] Elcox v. Hill, 98 U. S. 218, and cases below.

[2] Wilkins v. Earle, 44 N. Y. 172; 4 Am. Rep. 655; Pinkerton v. Woodward, *supra;* Shoecraft v. Bailey, 25 Iowa, 553.

[3] Hyatt v. Taylor, 42 N. Y. 259; Rosenplanter v. Roessle, 54 N. Y. 262; Ramaley v. Leland, 43 N. Y. 539; 3 Am. Rep. 728; Stewart v. Parsons, 24 Wis. 241.

[4] Ramaley v. Leland, 43 N. Y. 539; 3 Am. Rep. 728; "it is not carried as a jewel or ornament, but as a timepiece or chronometer, an article of ordinary wear by most travelers of every class, and of daily and hourly use by all. It is as useful and necessary to the guest in his room as out of it, in the night as the daytime. It is carried for use and convenience and not for ornament."

[5] Purvis v. Coleman, *supra;* Shulz v. Wall, *supra.*

[6] Spice v. Bacon, 2 Ex. Div. 463; 21 Moak Eng. Rep. 558. The statute limited the liability to £30, except in case (among others) "when such goods or property shall have been stolen, lost or injured through the wilful act, default

offer of a package for deposit without disclosure of its valuable character, and the innkeeper's direction to the guest to retain it, is a neglect on the part of the guest to deposit, which would ordinarily excuse the innkeeper, but not where the neglect did not contribute to the loss.[1]

Lien.— The landlord has a lien on the goods of the guest brought into the inn and the outbuildings for his reasonable charges,[2] but the relation of guest must subsist, and the lien does not extend to the goods of a mere boarder.[3] The lien extends to goods of a third person in the guest's possession, if the innkeeper does not know the real ownership,[4] and it extends to the guest's property exempt from

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or neglect of such innkeeper or any servant in his employ." The act required a copy of that portion of it to be printed and posted in a certain way. The defendant posted a copy, unintentionally omitting the word "act," and it was held not to relieve him from liability for loss by theft, on the ground that the posted notice contained no statement "which admits the continuance of the common-law liability for the goods or property which shall have been stolen, lost or injured through the wilful *act* of the innkeeper or any servant in his employment." It is difficult to understand the force of this reasoning. The landlord would be liable as at common law in spite of his omission, and the omission could have no effect on the guest unless to make him more careful.

[1] Bendetson v. French, 46 N. Y. 266, where the loss occurred after the package had been packed by the guest in his trunk and he had given the key of his room to the clerk, requesting him to have the trunk brought down immediately.

[2] Grinnell v. Cook, 3 Hill, 485; 38 Am. Dec. 663. Until the decision in Sanbolf v. Alford, 3 M. & W. 248, it was supposed that the innkeeper might detain the person of his guest or take off his clothes for his bill.

[3] *Ibid.;* Mowers v. Fethers, 61 N. Y. 38; Singer M. Co. v. Miller, 52 Minn. 516; 38 Am. St. Rep. 568; 21 L. R. A. 229. So if the innkeeper receives horses to stand at livery at his stable, he acquires no lien by the fact the owner subsequently takes occasional refreshments at the inn or sends a friend to be lodged there. Smith v. Dearlove, 6 C. B. 132.

[4] Grinnell v. Cook, *supra;* Singer M. Co. v. Miller, *supra;* Cook v. Kane, 13 Oreg. 482; 57 Am. Rep. 28; Threfall v. Borwick, L. R., 10 Q. B. 210; 12 Moak Eng. Rep. 266; Turrill v. Crawley, 13 Q. B. 197; even though placed apart from the personal goods of the guest, Mulliner v. Florence, 3 Q. B. Div. 484; 28 Moak Eng. Rep. 390. So of goods of his principal brought by a commercial traveler as

execution.[1] It even extends to stolen property.[2] The lien is dependent on possession, and is destroyed by surrender of the property,[3] or by sale, although keeping it entails expense.[4]

By statute in some States a boarding-house or lodging-house keeper is given a lien, and an innkeeper is given a lien on the goods of a boarder.

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samples, Manning v. Hollenbeck, 27 Wis. 202, even though he knows they belong to the employer; Robins & Co. v. Gray [1895], Q. B. 78. So of a lawyer's blue bag and its contents left by his clerk, Snead v. Watkins, 1 C. B. [N. S.], 267. But it is held in Georgia that the lien only attaches as against the true owner when there are charges on the specific article claimed; Domestic, etc., Co. v. Watters, 50 Ga. 573. If the innkeeper knows the goods do not belong to the guest, he acquires no lien, Broadwood v. Granara, 10 Exch. 417; Cook v. Kane, 13 Oreg. 482; Covington v. Newberger, 99 N. C. 522. It was early held that the innkeeper might detain the person of the guest for his charges, Newton v. Trigg, 1 Shower, 296; but this doctrine is now discarded; Sanbolf v. Alford, 3 M. & W. 248.

[1] Swan v. Bournes, 47 Iowa, 501; 29 Am. Rep. 492.

[2] Lake v. Greenaugh, Ld. Raym. 866.

[3] Grinnell v. Cook, *supra*.

[4] Mulliner v. Florence, *supra*.

CHAPTER X.

COMMON CARRIERS—WHO ARE COMMON CARRIERS

A common carrier is one who undertakes, for the public generally, to transport goods or persons from place to place by land or water for hire. One whose undertaking is gratuitous is only answerable as a mandatory.[1] But it is not necessary to constitute one a common carrier that the compensation should be fixed; it is sufficient if the right to it exists.[2] It has been held that it need not be his constant or exclusive business,[3] and that a private person who undertakes to carry for hire subjects himself to the liability of a common carrier,[4] even on a single occasion.[5] But the more general doctrine is that a carrier does not subject himself to the extraordinary liability of an insurer unless he is a *common* carrier, or engages to be under such liability for a particular carriage.[6] Common carriers are railroad companies, steamboat proprietors, stage coach owners and hackmen, owners

[1] Coggs v. Bernard, *supra;* Littlejohn v. Jones, 2 McMull. L. 365; 39 Am. Dec. 132; Dwight v. Brewster, 1 Pick. 50; 11 Am. Dec. 133; Sewall v. Allen, 6 Wend. 346; Jenkins v. Motlow, 1 Sneed, 248; 60 Am. Dec. 154.

[2] Knox v. Rives, 14 Ala. 249; 48 Am. Dec. 97.

[3] Chevallier v. Straham, 2 Tex. 115; 47 Am. Dec. 639, and note, 648.

[4] Powers v. Davenport, 7 Blackf. 497; 43 Am. Dec. 100.

[5] Chouteau v. Leech, 18 Pa. St. 224; 57 Am. Dec. 602; Moss v. Bettis, 4 Heisk. 661; 13 Am. Rep. 1; Steele v. McTyre, 31 Ala. 667; 70 Am. Dec. 516.

[6] There is a good deal of diversity on this point. Mr. Hutchinson (Carriers, § 48) thinks the criterion is that the common carrier holds himself out as such for all comers. Judge Nesbit (Fish v. Chapman, 2 Ga. 349; 46 Am. Dec. 393), thinks the test is his obligation to carry and his liability to an action for refusal. This is Story's view. See Samms v. Stewart, 20 Ohio, 69; 55 Am. Dec. 445; Allen v. Sackrider, 37 N. Y. 341; Fish v. Clark, 49 id. 122. This is approved, by many citations, by Mr. Freeman in note, 47 Am. Dec 648,

of ships and other vessels, wagoners and teamsters; public ferrymen, express companies,[1] transportation companies, and proprietors of elevators.[2] On the other hand, mere forwarders are not carriers, because ordinarily they do not un-

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who also cites opposing cases from Pennsylvania, Texas, Indiana, Tennessee and South Carolina. But undoubtedly a private person, engaging for one carriage, and liable to no such action, is under the liability of a common carrier for that single engagement, if it is so contracted.

[1] Fish v. Chapman, 2 Ga. 349; 46 Am. Dec. 393.

[2] Thomas v. Boston, etc., R. Co., 10 Metc. 472; 43 Am. Dec. 444; Spellman v. Lincoln R. T. Co., 36 Neb. 890; 20 L. R. A. 316 (steel railway company); Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16; Bowman v. Teall, 23 Wend. 306; 35 Am. Dec. 562; Orange Co. Bk. v. Brown, 9 Wend. 85; 24 Am. Dec. 129; Crosby v. Fitch, 12 Conn. 410; 31 Am. Dec. 745; Steele v. McTyer, 31 Ala. 667; 70 Am. Dec. 516; Gordon v. Hutchinson, 1 W. & S. 285; 37 Am. Dec. 464; Babcock v. Herbert, 3 Ala. 392; 37 Am. Dec. 695; Christenson v. Am. Ex. Co., 15 Minn. 270; 2 Am. Rep. 122; Hayes v. Wells, etc., 23 Cal. 185; 83 Am. Dec. 89; Belger v. Dinsmore, 51 N. Y. 166; 10 Am. Rep. 575; Bonce v. Dubuque St. Ry. Co., 53 Iowa, 278; 36 Am. Rep. 221; Harvey v. Rose, 26 Ark. 3; 7 Am. Rep. 595; Wyckoff v. Queens Co. F. Co., 52 N. Y. 32; 11 Am. Rep. 650; Lemon v. Chanslor, 68 Mo. 340; 30 Am. Rep. 799; Parmalee v. Lowitz, 74 Ill. 116; 24 Am. Rep. 276 (baggage expressman); Merchants' Des. Co. v. Bloch, 86 Tenn. 392; 6 Am. St. Rep. 847; Buckland v. Adams Ex. Co., 97 Mass. 124; 93 Am. Dec. 68. In Goodsell v. Taylor, 41 Minn. 207; 4 L. R. A. 673, the responsibility of the proprietor of a passenger elevator in a hotel was likened to that of a common carrier of passengers. To the same effect, Treadwell v. Whittier, 80 Cal. 574; 5 L. R. A. 498. In the latter the court observed: "The same degree of responsibility" — as a carrier's — "must attach to one controlling and running an elevator. Persons who are being lifted by elevators are subjected to great risks of life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, so far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsibility for the slightest neglect." "The defendants were bound to acquaint themselves with the best mode of running this elevator, so as to carry safely those who rode on it." This case is approved in Mitchell v. Marker, 62 Fed. Rep. 139; 25 L. R. A. 33, where the court observed: "We see no distinction in principle between the degree of care required from a carrier of pas-

dertake to deliver;[1] tow-boat owners, because they are not bound to tow for every one nor between certain *termini*;[2] nor are log and booming companies;[3] canal companies;[4] nor a private and gratuitous ferryman;[5] nor a ferryman where the passenger takes the property into his exclusive control,[6] nor a government mail carrier,[7] nor a sleeping-car company,[8] nor a telegraph nor a telephone company,[9] nor a bridge company.[10]

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engers horizontally, by means of railway cars and stage-coaches, and one who carries them vertically, by means of a passenger elevator."

[1] Roberts v Turner, 12 Johns. 232; 7 Am. Dec. 311

[2] Arctic F Ins. Co. v. Austin, 69 N. Y. 470; 25 Am. Rep 221, Varble v. Bigley, 14 Bush. 698; 29 Am. Rep. 435, citing the contrary decisions; Hays v. Millar, 77 Pa. St. 238; 18 Am. Rep. 445; Munks v. Jackson, 66 Fed. Rep 571. It should be added, that the tow-boat owner has not exclusive possession and control of the tow.

[3] Mann v. White River, etc., Co., 46 Mich. 38; 41 Am. Rep. 141; Shaw v. Davis, 7 Mich. 318.

[4] Penn. Can. Co. v. Burd, 90 Pa. St. 281; 35 Am. Rep. 659, Watts v. Savannah, etc., Can. Co., 64 Ga. 88; 37 Am. Rep. 53.

[5] Self v. Dunn, 42 Ga. 528; 5 Am. Rep. 544.

[6] Harvey v. Rose, 26 Ark. 3; 7 Am. Rep. 595, Wyckoff v Queens Co. F. Co, 52 N. Y. 32; 11 Am. Rep. 650; White v. Winnisimmet Co., 7 Cush. 155.

[7] Cent. R. & B. Co. v. Lampley, 76 Ala. 357; 52 Am. Rep. 334.

[8] Pullman Palace Car Co. v. Gavin, 93 Tenn. 53; 42 Am. St. Rep. 903; 21 L. R. A. 298; Mann Boudoir Car Co. v. Duprè, 54 Fed. Rep. 646; 21 L. R. A. 289, and note, 291.

[9] Birney v. N. Y., etc., Tel. Co., 18 Md. 341; 81 Am. Dec. 607; and note, 613; Leonard v. N. Y., etc., Tel. Co., 41 N. Y. 544; 1 Am. Rep. 446. But they are bound to serve the public without discrimination. Notes, 44 Am. Rep. 241; 45 id. 487; Western Un. Tel. Co. v. Call Pub. Co., Neb. Sup. Ct.; 27 L. R. A. 622. In this case it is said *obiter* that "a telegraph company is a public carrier of intelligence, with rights and duties analogous to those of a public carrier of goods or passengers." Some of the older cases held a telegraph company to be a common carrier. Parks v. Alta Cal. Tel. Co., 13 Cal. 422; 73 Am. Dec. 589; Tyler v. West. Un. Tel. Co., 60 Ill. 427; Western Un. Tel. Co. v. Buchanan, 35 Ind. 440.

[10] Kentucky, etc., B. Co. v. Louisville, etc., R. Co., 37 Fed. Rep. 567; 2 L. R. A. 289; Grigsby v. Chappell, 5 Rich. L. 443.

It will be gathered from the cases cited above that the essentials constituting a common carrier are (1) the public employment; (2) the habitual business; (3) the exclusive custody of the goods; (4) the obligation to carry and deliver; (5) the payment of hire. (Some cases add, the plying between fixed *termini*. *Varble* v. *Bigley*, *supra*.) These elements combining, it is not essential that the carrier should own or control the vehicles employed by him; he may employ those of others, or may let others employ his, retaining charge thereof by his own servants.[1]

[1] Merchants' D. T. Co. v. Bloch, above.

CHAPTER XI.

COMMON CARRIERS OF GOODS — OBLIGATION TO RECEIVE GOODS — WHEN IT ATTACHES.

The common carrier of goods is bound to receive and carry goods for all alike, without discrimination, provided his charges are paid in advance if he demands them, and provided he has the requisite facilities and accommodations, and the goods are such as he may safely carry, and such as he is in the habit of carrying.

It is of the very essence of his calling that he is a *common* carrier, bound to carry for all, and he is liable to an action for wrongfully refusing to receive and carry, and may even be compelled to do so.[1] He may not make discriminations of persons or goods, and thus prevent or impair the common enjoyment of the public right which he professes to subserve.[2] He is not bound to receive goods except from the owner or his agent.[3] He is not excused from receiving by a statute prohibiting certain kinds of transportation and afterward pronounced unconstitutional.[4] He is excused when prevented by the violence of strikers.[5]

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[1] Fish v. Chapman, 2 Ga. 349; 46 Am. Dec. 393, and cases cited. But if he is also a wharfinger, he may discriminate in that capacity. Audenried v. Phila., etc., R. Co., 68 Pa. St. 370; 8 Am. Rep. 195.

[2] Messenger v. Penn. R. Co., 37 N. J. S. 531; 18 Am. Rep. 754; N. E. Ex. Co. v. Me. Cent. R. Co., 57 Me. 188; 2 Am. Rep. 31; McDuffee v. Portland, etc., R. Co. 52 N. H. 430; 13 Am. Rep. 72.

[3] Fitch v. Newberry, 1 Dougl. 1; 40 Am. Dec. 33, and note 44. The seller of goods may be such agent for the buyer. Cross v. O'Donnell, 44 N. Y. 661; 4 Am. Rep. 721.

[4] Chicago, etc., R. Co. v. Erickson, 91 Hill, 613; 33 Am. Rep. 70.

[5] Pittsburgh, etc., Ry. Co. v. Hollowell, 65 Ind. 188; 32 Am. Rep. 63.

He is not bound to receive money for carriage unless it has been his custom,[1] nor is a railroad company bound to receive nor liable as a common carrier for a menagerie in cars owned and controlled by the owners of the menagerie, and run on a time schedule to suit them;[2] nor to furnish an express company with facilities for doing its business, if it has previously facilitated another which does all the business demanded;[3] but it is bound to receive cars of another railroad as a common carrier.[4] He is not bound to receive and transport perishable property to the exclusion of other goods.[5] He is not bound to accept goods to be delivered at a point beyond his terminus; as for example, at an elevator on a track owned by another company, or at a town beyond the end of his route.[6] Of course it is in modern times an everyday occurrence for him to do so, and it would be impracticable for him to do business on any other footing, but the rule of law is unquestionably that he is under no obligation to take goods for delivery at a point beyond his own terminus.

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[1] F. & M. Bank v. Champlain T. Co., 16 Vt. 52; 42 Am. Dec. 491; nor unless properly secured and addressed, Fitzgerald v. Adams Ex. Co., 24 Ind. 447; 87 Am. Dec. 341. As to cash letters, Knox v. Rives, 14 Ala. 249; 48 Am. Dec. 97.

[2] Coup v. Wabash, etc., Ry. Co., 56 Mich. 111; 56 Am. Rep. 374; Chicago, etc., R. Co. v. Wallace, 66 Fed. Rep. 506.

[3] Atlantic Ex. Co. v. Wilmington, etc., R. Co. 111 N. C. 463; 18 L. R. A. 393; 32 Am. St. Rep. 805; Express cases, 117 U. S. 1. See Sanford v. Catawissa, etc., R. Co., 24 Pa. St. 378; 64 Am. Dec. 667, and ref. p. 97, n. 8.

[4] Peoria, etc., Ry. Co. v. Chic., etc., Ry. Co., 109 Ill. 135; 50 Am. Rep. 605.

[5] Dixon v. Chic., etc., Ry. Co., 64 Iowa, 531; 52 Am. Rep. 460.

[6] People v. Chic., etc., R. Co., 55 Ill. 95; 8 Am. Rep. 631; but otherwise where the elevator is on tracks operated by him in common with other companies. Chic., etc., Ry. Co. v. People, 56 Ill. 365; 8 Am. Rep. 690; Erie Ry. Co. v. Wilcox, 84 Ill. 239; 25 Am. Rep. 451; Mulligan v. Ill. Cent. R. Co., 36 Iowa, 181; 14 Am. Rep. 514; Lawson Cont. of Carr. § 236; note, 72 Am. Dec. 231; Berg v. Atchison, etc., R. Co., 30 Kans. 561.

He may refuse dangerous or offensive articles; as for example, nitric acid or dynamite or gunpowder or fireworks, or a human corpse,[1] and so he may refuse goods threatened with destruction by a mob or by fire,[2] or when they are perishable and he has no means to forward them in the requisite time;[3] but not on the mere ground that he is not informed of their character.[4]

He cannot impose on the owner a duty incumbent on himself; as for example, that he shall go on the same train with his stock to feed and water it, although such may have been the custom;[5] nor may he refuse to accept the goods unless the owner will release him from liability for the negligence of himself and his servants,[6] or release him from liability except for losses occasioned by such negligence.[7] He may not impose a stipulation to vary his common-law liability. He may bind himself by a written agreement for a certain time at fixed prices.[8]

He may refuse the goods if the transportation is impossible; as for example, by reason of low water or freezing,[9] but not by the mere fact that no boats were passing. He may refuse the goods if he has not the means of carrying them, as where his coach or ship is full; but in the case of railway companies they are bound to anticipate the usual and ordi-

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[1] Farrant v. Barnes, 11 C. B. [N. S.] 553; Barney v. Burstenbinder, 7 Lans. 210; Parrot v. Wells, 15 Wall, 524.

[2] Edwards v. Sherratt, 1 East. 604; Pearson v. Duane, 4 Wall. 605.

[3] Tierney v. N. Y. Cent., etc., R. Co., 76 N. Y. 305.

[4] Crouch v. L. & N. W. Ry. Co., 14 C. B. 255.

[5] Mo. Pac. Ry. Co. v. Fagan, 72 Tex. 127; 13 Am. St. Rep. 776.

[6] Railroad Co. v. Lockwood, 17 Wall. 357; note, 13 Am. St. Rep. 782. *Contra:* Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180; 27 Am. Rep. 28; note, 13 Am. St. Rep. 784.

[7] Railway Co. v. Cravens, 57 Ark. 112; 38 Am. St. Rep. 230; Adams Ex. Co. v. Nock, 2 Duvall, 562; 87 Am. Dec. 510.

[8] Harvey v. Conn., etc., R. Co., 124 Mass. 421; 26 Am. Rep. 673.

[9] Doty v. Strong, 1 Pinney, 313; 40 Am. Dec. 773.

nary demands of business, and to provide sufficient facilities and means for all the freight which might reasonably be expected, but they are not bound to provide in advance for extraordinary occasions nor anticipate an unusual influx of business.[1]

Discriminations.—The carrier may not make unjust discrimination as to prices of carriage. He must carry for a reasonable renumeration, but he is not bound to carry for the same price for all.[2] So he may discriminate between large and small quantities,[3] and between persons living at a distance and those living nearer, in order to secure freight that would otherwise go by another route.[4] Reasonableness, and impartiality between those similarly situated, constitute the test. Partiality exists only where advantages are equal, and one party is unduly favored at the expense of another who stands upon an equal footing.[5] At common

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[1] Johnson v. Midland R. Co., 18 L. J. Ex. 366; Chicago, etc., R. Co. v. Dawson, 79 Mo. 296; Ballentine v. North Mo. R. Co., 40 Mo. 491; 93 Am. Dec. 315; Lovett v. Hobbs, 2 Shower, 127; Peet v. Ry. Co., 20 Wis. 594; 91 Am. Dec. 446.

[2] Johnson v. Pensacola, etc., R. Co., 16 Fla. 623; 26 Am. Rep. 731; Ex parte Benson, 18 S. C. 38; 44 Am. Rep. 564.

[3] Concord, etc., R. Co. v. Forsaith, 59 N. H. 122; 47 Am. Rep. 181. But *contra:* Louisville, etc., R. Co v. Wilson, 132 Ind. 517; 18 L. R. A. 105, and note.

[4] Ragan v. Aiken, 9 Lea, 609; 42 Am. Rep. 684.

[5] Cleveland, etc., R. Co. v. Closser, 126 Ind. 348; 22 Am. St. Rep. 593; 9 L. R. A. 754; Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., 37 Fed. 567; 2 L. R. A. 289. But a carrier may not favor a large shipper above a small one, Louisville, etc., R. Co. v. Wilson, 132 Ind. 517; 18 L. R. A. 105; nor unequally discriminate in order to secure custom, State v. Cincinnati, etc., R. Co., 47 Ohio St. 130; 7 L. R. A. 319; nor make a rebate in favor of one, Fitzgerald v. Grand Trunk Ry. Co., 63 Vt. 169; 13 L. R. A. 70; Cook v. Chicago, etc., Ry. Co., 81 Iowa, 551; 9 L. R. A. 764. But when a rebate is made in consideration of the shipper's erecting on the railroad company's land a dock, for the use of both parties, it is a question of fact whether the discrimination is unjust. Root v. L. I. R. Co. 114 N. Y. 300; 4 L. R. A. 331; 11 Am. St. Rep. 643. In State v.

law an action will lie against a common carrier for an unreasonable and excessive freight charge, but not for a mere

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Railway, 47 Ohio St. 130, it was held that it was unlawful to fix a lower rate of freight for petroleum in tank cars than for petroleum in barrels.

In Lough v. Outerbridge, 143 N. Y. 271; 42 Am. St. Rep. 712; 25 L. R. A. 674, it was held that if a common carrier offers to carry goods at a time designated by it at a reduced price, on condition that its customers do not at that time ship any other freight by any other line, and to those customers who refuse to agree to give it their exclusive business during such time charges its usual rates, it is not, if the rates charged are reasonable, bound to carry at the reduced rates for those who refuse to assent to the conditions upon which those rates are offered. The court said: "There can be no doubt that at common law a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently, and in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge anyone an excessive price for the services. He has no right in any case, while engaged in this public employment, to exact from anyone anything beyond what under the circumstances is reasonable and just. 2 Kent's Commentaries, 13th edition, 598; Story on Bailments, §§ 495, 508; 2 Parsons on Contracts, 175; Killmer v. New York Cent., etc., R. Co. 100 N. Y. 395; 53 Am. Rep. 194; Root v. Long Island R. Co., 114 N. Y. 300; 11 Am. St. Rep. 643. It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. * * * What is reasonable and just in a common carrier in a given case, is a complex question into which enter many elements for consideration. The question of time, place, distances, facilities, quantity and character of the goods, and many other matters must be considered. The carrier can afford to carry ten thousand tons of coal or other property to a given place for less compensation per ton than he could carry fifty, and where the business is of great magnitude, a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable, one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates. In this case, the finding implies that the defendants, at certain times, carried goods at a loss, upon the shippers gave them all their business. Whatever effect may be given to the legislation referred to, in its

discrimination in favor of another shipper.[1] He may even carry for one without charge.

The common carrier is subject to an action for refusing to receive and carry goods properly offered,[2] and if he constrains the owner into paying an unreasonable charge in order to get his goods carried, the owner may recover

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application to railroads and other corporations deriving their powers and franchises from the State, there can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rules are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons, not applicable to the whole public, does not furnish the parties not similarly situated any just grounds for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary, in the cases cited by the learned counsel for the plaintiff, originated in the application of statutory regulations in other States and countries. Fitchburg R. Co. v. Gage, 12 Gray, 393; Sargent v. Boston, etc., R. Corp., 115 Mass. 416; Mogul S. S. Co. v. McGregor, 21 Q. B. Div. 544; affirmed 23 Q. B. Div. 598, and by H. L. 17 Abb. Cas. 25; Evershed v. London, etc., Ry. Co., 3 Q. B. Div. 135; Baxendale v. Eastern Counties R. Co., 4 C. B., N. S. 78; Branley v. Southeastern Ry. Co. 12 C. B., N. S. 74."

See also Messenger v. Penn. R. Co., 36 N. J. L. 407; 13 Am. Rep. 457; Chic., etc., R. Co. v. People, 67 Ill. 11; 16 Am. Rep. 599; McDuffee v. Portland, etc., R. Co., 52 N. H. 430; 13 Am. Rep. 72; Hawley v. Kansas, etc., Co., —— Kans. In N. E. Ex. Co. v. Me. Cent. R. Co., 57 Me. 188; 2 Am. Rep. 31, it was held that a railroad company could not give one express company privileges to the exclusion of any other. But see ref. p. 96, n. 3. The carrier must ordinarily take and carry property in the order in which it is offered, otherwise it constitutes an illegal preference. Palmer v. London, etc., R. Co., L. R. 1 C. P. 588; Houston, etc., R. Co. v. Smith, 63 Tex. 322.

[1] Cowden v. Pac. Coast St. Co., 94 Cal. 470; 28 Am. St. Rep. 142; Avinger v. S. C. Ry. Co., 29 S. C. 265; 13 Am. St. Rep. 716; Root v. L. I. R. Co., 114 N. Y. 300; 11 Am. St. Rep. 643; 4 L. R A. 331.

[2] Doty v. Strong, 1 Pinney (Wis.) 313; 40 Am. Dec. 773; Jackson v. Rogers, 2 Shower, 328; Boson v. Sandford, id. 101; Harvey v. Conn., etc., R. Co., 124 Mass. 421; 26 Am. Rep. 673.

back the excess provided he paid under protest and sues within a reasonable time.[1]

Delivery to carrier.—In order to charge the carrier, there must be a delivery and acceptance of the goods. Delivery must be made to him personally, or to his agents; or the goods must be left in the usual place for receiving goods, and notice given to him or his agents; and thus made it will bind him.[2]

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[1] Garton v. B. & E. R. Co. 1 Ell. B. & S. 112; Peters v. R. Co. 42 Ohio St. 275; 51 Am. Rep. 814; Killmer v. N. Y. etc. R. Co. 100 N. Y. 395; 53 Am. Rep. 194.

[2] Selway v. Holloway, 1 Ld. Raym. 46; Grosvenor v. N. Y. Cent. R. Co., 39 N. Y. 34; Merriam v. Hartford, etc., R. Co., 20 Conn. 354; 52 Am. Dec. 344; Louisville, etc., Ry. Co. v. Flanagan, 113 Ind. 483; 3 Am. St. Rep. 674; Lake Shore, etc., R. Co. v. Brown, 123 Ill. 162; 5 Am. St. Rep. 510. The cases are at variance in respect to leaving the goods in a particular place, according to custom, but without notifying the carrier. This is held insufficient to charge the carrier, in Packard v. Getman, 6 Cowen, 757; 16 Am. Dec. 475; Grosvenor v. N. Y. Cent. R. Co., above; but it is generally held sufficient if done in accordance with a prior arrangement between the parties or with a custom; Merriam v. Hartford, etc., R. Co., above; Galena, etc., R. Co. v. Rae, 18 Ill. 491; and it has thus been held, even though the custom was contrary to the rules of the carrier known to the owner, Montgomery, etc., R. Co. v. Kolb, 73 Ala. 396; 49 Am. Rep. 54. If delivery is made at an accustomed place and to his servant or some person who has been accustomed there to receive goods for him, this will certainly be a good delivery to him. Merritt v. Old Colony, etc., Ry., 11 Allen, 80; Burrell v. North, 2 C. & K. 680; Minter v. Pac. R. Co., 41 Mo. 503; 97 Am. Dec. 288. The shipper's knowledge of the carrier's direction not to receive the goods will not relieve the carrier if he actually undertakes the transportation. Bennett v. Am. Ex. Co. 83 Me. 236; 13 L. R. A. 33; 23 Am. St. Rep. 774. A ferryman becomes liable from the moment the horse or wagon is on the slip or drop of the ferry. Cohen v. Hunn, 1 McCord L. 430. Delivery of money to the clerk of a steamboat does not charge the carrier. Wilcox v. Steamboat, 9 La. 80; 29 Am. Dec. 436. Delivery to the clerk of an express company outside the office does not charge the carrier. Cronkite v. Wells, 32 N. Y. 247; but delivery to the driver in charge of an express wagon collecting goods is a good delivery to the company. Wilmington Dental M. Co. v. Adams Ex. Co., 8 Houst. 329. A carrier is liable from the moment goods

Bill of lading.—As between the shipper and the carrier the recital in a bill of lading of the receipt of the property, or of its quantity, value and condition may be contradicted by parol.[1] So where the printed words contained the phrase, "contents unknown," and the written words described the property as "30 bbls. eggs," the carrier was allowed to show, even as against a transferee of the bill of lading for value, that the contents were only sawdust.[2]

But as between the carrier and the transferee of a bill of lading for value, when it is signed by an agent authorized to sign bills only on receipt of the property, but without receiving the property, it is a vexed question whether the carrier may show that he did not receive the property.[3]

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are received in his freight-house, ready for transportation as fast as he can furnish cars, although the shipper has agreed to load them. London, etc., F. Ins. Co. v. Rome, etc., R. Co., 144 N. Y. 200; 43 Am. St. Rep. 752. The Court said: "The property was stored for the convenience of the carriers, and not for the convenience of the shippers." This case contains an excellent statement of the general law as to when the carrier's liability attaches.

[1] Witzler v. Collins, 70 Me. 290; 35 Am. Rep. 327; Dean v. Driggs, 137 N. Y. 274; 33 Am. St. Rep. 721; Browne Par. Ev. § 106, and cases cited

[2] Miller v. Hannibal, etc., R. Co., 90 N. Y. 430; 43 Am. Rep. 179.

[3] Browne Par. Ev. § 107 and cases cited. That the recital may be contradicted: Grant v. Norway, 10 C. B. 665; Balt. & Ohio R. Co. v. Wilkens, 44 Md. 11; 22 Am. Rep. 26; Black v. Wilmington, etc, R. Co., 92 N. C. 42; 53 Am. Rep. 450; Nat. Bank v. Chic., etc., R. Co., 44 Minn. 224; 20 Am. St. Rep. 566; Pollard v. Vinton, 105 U. S. 7. That the recital may not be contradicted. Armour v. M. C. R. Co., 65 N. Y., 111; 22 Am. Rep. 603; Bank of Batavia v. N. Y., etc. R. Co., 105 N. Y. 195; 60 Am. Rep. 440; Lake Shore, etc., Ry. Co. v. Foster, 104 Ind. 293; 54 Am. Rep. 319; Sioux City, etc., R. Co. v. First N. Bank, 10 Neb. 556; 35 Am. Rep. 488; Brooke v. N. Y., etc., R. Co., 108 Pa. St. 529; Savings Bank v. Atchison, etc., R. Co., 20 Kans. 519; St. Louis, etc., R. Co. v. Larned, 103 Ill. 293. The latter view seems to me preferable. "If it were once understood that the evidence which they carry on their face is only *prima facie*, and that the carrier may rebut it by showing that he never had the goods for which his agent, authorized to sign bills of lading, has signed, it would create great inconvenience and fill the business community with distrust. No trader or bank at a distance could feel any security in ad-

It is incompetent to show that the bill of lading was intended to embrace goods elsewhere.[1]

Having received the goods the carrier is estopped from raising the objection that he was not bound to receive them.[2]

His liability as carrier attaches from the time of acceptance,[3] unless the shipper requests delay, and then he is liable only as a warehouseman.[4] If he accepts the goods during a storm he is still bound from that moment.[5]

The delivery to the carrier must be made without fraud, disguise or concealment as to character or value, intended to throw him off his guard and procure the carriage at a smaller price than would otherwise be charged. Thus he is not liable for silks and furs packed in bedding and carried at a lower rate,[6] or a box of coin packed like common goods.[7]

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vancing money on such documents without inquiry, and inquiry would frequently be impracticable. The motto in the premises should not be, let the consignee or indorser beware of the statement of the bill, but rather let the carrier beware of his agent's want of integrity or carefulness in putting the false bill afloat." Browne Par. Ev. p. 373.

[1] Witzler v. Collins, 70 Me. 290; 35 Am. Rep. 327.

[2] Stuart v. Crawley, 2 Stark. 286 (grayhound improperly secured); Porterfield v. Humphreys, 8 Humph. 497 (horse improperly secured); Phillips v. Earle, 8 Pick. 182 (package delivered at post-office instead of coach-office); Hickox v. Naugatuck R. Co., 31 Conn. 281; 83 Am. Dec. 143 (trunk received before train time); Pickford v. Grand Junc. R. Co., 12 M. & W. 766 (received after time prescribed); Bennett v. Am. Ex. Co., above (where agent had been ordered not to receive goods like those in question).

[3] Forward v. Pittard, 1 T. R. 27.

[4] Barron v. Eldredge, 100 Mass. 455; 1 Am. Rep. 126; Blossom v. Griffin, 13 N. Y. 569; 67 Am. Dec. 75.

[5] Brunswick, etc., Trans. Co. v. Tiers, 4 Zab. 697; 64 Am. Dec. 394.

[6] Chicago & Alton R. Co. v. Shea, 66 Ill. 471.

[7] Gorham Manuf. Co. v. Fargo, 35 N. Y. Super. 434. So the carrier is not responsible where two hundred sovereigns were packed in six pounds of tea, Bradley v. Waterhouse, 1 M. & M. 254; for money concealed in a bag of hay, Gibbon v. Paynton, 4 Burr. 2298; or put in a box with trifling articles,

The question of delivery to the carrier is one of fact.[1]

Belger v. Dinsmore, 51 N. Y. 166; or a diamond ring put in a paper bag tied with a string, Everett v. So. Ex. Co., 46 Ga. 303; or a check enclosed in blank in a letter, Hayes v. Wells, Fargo Co., 23 Cal. 185; or brittle articles sent without disclosure, Chic., etc., R. Co. v. Thompson, 19 Ill. 578; or a trunk containing jewelry marked "glass," Relf v. Rapp, 3 W. & S. 21; 37 Am. Dec. 528. A constructive, if not an actual fraud to obtain cheap rates of freight, which relieves the carrier from liability for loss of the goods, is shown where a man of intelligence ships in a basket with a rope around it, without making known its contents, a quantity of silks, satins, laces, curtains, silver spoons and other valuable articles, most of which were for sale by his wife in her business as a dressmaker and milliner, and remains silent when he hears the carrier's agent designating them as "household goods," the rate on which is very much less than on merchandise. Shaacht v. Illinois C. R. Co., 28 L. R. A. 176; 94 Tenn. 658. The consignor is not bound to state the value unless asked. Lebeau v. Gen. S. N. Co., L. R., 8 C. P. 88; Baldwin v. L. & G., etc., Co., 74 N. Y. 125; Merch. D. Co. v. Bolles, 80 Ill. 473. But if asked and he refuses to divulge it or misrepresents it, the carrier may protect himself against any extraordinary responsibility not apparently imposed by the outward appearance. Cole v. Goodwin, 19 Wend. 251; 32 Am. Dec. 470; Fish v. Chapman, 2 Ga. 349; 46 Am. Dec. 393.

[1] Gass v. N. Y., etc., R. Co., 99 Mass. 220; 96 Am. Dec. 742.

CHAPTER XII.

CARRIERS OF GOODS — CONTRACT OF CARRIAGE EXPRESS OR IMPLIED.

The common carrier of goods, having accepted them for carriage, is bound, in the absence of express contract, to forward them with reasonable despatch to their destination or to the end of his route; and on arrival at the destination to deliver them to the consignee or give him reasonable notice of their arrival, or if the destination is beyond the end of his route to deliver them to a connecting carrier; and he is liable not only for the negligence of himself and his servants in these respects, but he is responsible for the safety and good condition of the goods, like an insurer, against all casualties, injuries and loss, except those which occur through the act of God or inevitable accident, the public enemies, the nature and qualities of the goods themselves, the conduct of the shipper, or the act or mandate of the public authorities.

The common carrier may not limit his liability as stated above by mere notice, either general or special, but he may limit it by express contract with the shipper, or by notice brought home to him and assented to by him; but he cannot impose on the shipper any condition relieving him from liability for the negligence of himself or his agents or servants.

This severe rule of common law liability grew up under the same conditions as those which led to the imposition of the similar rule concerning innkeepers, and notwithstanding the changed conditions of modern times has been adhered to with great strictness, subject always to the mode and measure of relief above indicated. Under the

modern as under the ancient rule the carrier is an insurer with the limitations above laid down.[1]

Act of God and inevitable accident.—The operation of this exception is comparatively infrequent, for nearly every accident is preventable and human agency generally contributes to it. The phrase is restricted to casualties occasioned purely and entirely by superhuman means, such as lightning, earthquakes, tempests, tidal waves, sudden and unprecedented floods or frosts, and the like.[2] It has

[1] Coggs v. Bernard, 2 Ld. Raym. 909; Forward v. Pittard, 1 T. R. 27; Fish v. Chapman, 2 Ga. 349; 46 Am. Dec. 393 ("This is an era of stir—men and goods run to and fro—and common carriers are multiplied. The convenience of the people and the safety of property depend more now, I apprehend, upon the rules which regulate the liability of these public ministers, than at any other period of the world's history.") See Whitesides v. Thurkill, 12 Sm. & M. 599; 51 Am. Dec. 128; Williams v. Grant, 1 Conn. 487; 7 Am. Dec. 235; Colt v. McMechen, 6 Johns. 160; 5 Am. Dec. 200; Craig v. Childress, 1 Peck (Tenn.), 270; 14 Am. Dec. 751; Daggett v. Shaw, 3 Mo. 264; 25 Am. Dec. 439; Robertson v. Kennedy, 2 Dana, 430; 26 Am. Dec. 466; Parsons v. Hardy, 14 Wend. 215; 28 Am. Dec. 521; Van Horn v. Taylor, 7 Rob. (La.) 201; 41 Am. Dec. 279; Parker v. Flagg, 26 Me. 181; 45 Am. Dec. 101; Leonard v. Hendrickson, 18 Pa. St. 40; 55 Am. Dec. 587; Moses v. B. & Me. R. 24 N. H. 71; 55 Am. Dec. 222; New B. etc., Co. v. Tiers, 4 Zab. 697; 64 Am. Dec. 394; Fergusson v. Brent, 12 Md. 9; 71 Am. Dec. 582; Welsh v. Pittsburgh, etc., R. Co., 10 Ohio St. 65; 75 Am. Dec. 490; Hooper v. Wells, etc., 27 Cal. 11; 85 Am. Dec. 211; Merritt v. Earle, 29 N. Y. 115; 86 Am. Dec. 292; Blumenthal v. Brainard, 38 Vt. 402; 91 Am. Dec. 350; Adams Ex. Co. v. Darnell, 31 Ind. 20; 99 Am. Dec. 582; Gulf, etc., Ry. Co. v. Levi, 76 Tex. 337; 18 Am. St. Rep. 45; Wood v. Crocker, 18 Wis. 345; 86 Am. Dec. 773; Buckland v. Adams Ex. Co. 97 Mass. 124; 93 Am. Dec. 68. This doctrine is universal in this country, and is adhered to in all the States in all later decisions.

[2] The definition of "act of God" and the distinction between it and "inevitable accident" is set forth by the present writer in a note to Nugent v. Smith, 1 C. P. Div. 19, 423; 1 Eng. Rul. Cas. 218, which is here reproduced by permission:

"The principal case is unanimously followed by an innumerable crowd of cases in this country. The cases unanimously recognize the 'act of God' as

generally been deemed that the phrases "act of God" and "inevitable accident" are synonymous, but a distinc-

something superhuman and distinguishable from the act or participation of man. It will be useful to refer only to a few of the most prominent. The following are classed as 'acts of God,' or inevitable accident, excusing the carrier: a 'snag' in the usual course of a river, Smyrl v. Niolen, 2 Bailey (S. C.), 421; 23 Am. Dec. 146; a rock in the sea, Williams v. Grant, 1 Conn. 487; 7 Am. Dec. 235;* a sudden failure of wind causing running aground, Colt v. McMechen, 6 Johns. (N. Y.), 160; 5 Am. Dec. 200; a snow storm, Ballentine v. No. Missouri R. Co., 40 Mo. 491; 93 Am. Dec. 315; a furious wind which blows a car from the track, Blythe v. Denver, etc., Co., 15 Colo. 333; 11 Lawyers' Rep. Annotated, 615, and notes; the Johnstown flood of 1889, caused by the breaking of a dam, Long v. Penn. R. Co., 147 Penn. St. 343; 14 Lawyers' Rep. Annotated, 741; a flood such as has occurred but twice in a generation, Pearce v. The Thomas Newton, 41 Fed. Rep. 106; Smith v. Western Ry. Co., 91 Ala. 455; 11 Lawyers' Rep. Annotated, 619; the freezing of canals and rivers, Bowman v. Teall, 23 Wend. (N. Y.), 306; Harris v. Rand, 4 N. H. 259; Crosby v. Fitch, 12 Conn. 410; delay caused by discharged strikers, Pittsburg, etc., R. Co. v. Hazen, 84 Ill. 36; 25 Am. Rep. 422; Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563; 55 Am. Rep. 837.

"The following have been held not 'acts of God' or inevitable accident: All catastrophies in which human agency in any degree unites; see cases cited, ante p. 208; fire other than by lightening, Gilmore v. Carman, 1 Smedes & Marshall (Miss.), 279; 40 Am. Dec. 96; displacement of a buoy by natural causes, Reaves v. Waterman, 2 Speer's Law (S. C.), 197; 42 Am. Dec. 364; collision of vessels without fault of either, Plaisted v. Boston, etc., Co., 27 Me. 132; 46 Am. Dec. 587, citing Forward v. Pittard, and Coggs v. Bernard; runinng of flat-boat on sunken log in river, Steele v. McTyer's Adm'r, 31 Ala. 667; 70 Am. Dec. 516; driving of a vessel by a squall on the mast of a sunken vessel projecting out of water, Merritt v. Earle, 29 N. Y., 115; 86 Am. Dec. 292; a recently formed bar in a river, Friend v. Woods, 6 Grattan (Va.), 189; 52 Am. Dec. 119; citing Forward v. Pittard; McArthur v. Sears, 21 Wend. (N. Y.), 196; a reservoir filled by unusual rains but broken by a stranger, Polack v. Pioche, 35 Cal. 416; 95 Am. Dec. 115, and note 118; the great Chicago fire (caused by a cow kicking over a lamp in a shed), Chicago, etc., Ry. Co. v. Sawyer, 69 Ill. 285; 18 Am. Rep. 613, and note 618, giving C. J. Cockburn's opinion in Nugent v. Smith, and observing, that "as we believe the meaning of the term has never been before judicially passed upon;" attack on

* But not so if laid down in any chart; Pennewills v. Cullen, 5 Harring. 238.

tion has occasionally been drawn. Thus a collision of vessels in the dark without negligence is an inevitable

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a train by thieves and a driving of them away by a band of citizens, and the destruction by the latter of a quantity of whiskey to prevent its falling into the hands of the former, Long v. Pennsylvania R. Co. (Penn.), 147 Penn. St. 343.

"As to the amount of skill and diligence which a carrier is bound to exert in order to avert the consequences of an act of God, the substance of the case is well expressed in Nashville, etc., R. Co. v. David, 6 Heiskell (Tennessee), 261; 19 Am. Rep. 594, the case of an unprecedented flood, in which it was held that the carrier is not bound to use all the diligence which human sagacity would suggest, but only to use actively and energetically such means as would suggest themselves to and be within the knowledge and capacity of well informed and competent business men in such positions, and such diligence as prudent, skillful men engaged in that kind of business might be expected to use. In regard to any stricter requirements, the court said: 'It might with equal propriety be required that the road should use all reasonable efforts to provide against a flood such as the Deluge in the days of Noah.' And so in Long v. Penn. R. Co., *supra*; the Johnstown flood case, the court said: the loss 'happened in spite of the utmost care exercised by agents and employees to escape the dangers it knew to exist or had reasonable ground to apprehend. It may be possible for us, looking back coolly and in the light of history, to see how property and life might have been saved if men on the ground had realized the awful magnitude of the impending calamity. It was not realized. The inhabitants of the populous valley sat in their homes, or went about their business, while the deluge was approaching. So swift was its approach that the horseman, running to warn the city, was overtaken and swallowed up, and the flood fell unannounced, and swept the day express and the city of Johnstown before it. What was done on that day must be considered in the light of what was then known, and what with such knowledge it was reasonable to comprehend.' 'Reasonable prudence and diligence' is the test. Smith v. West. Ry., *supra*.

"If the act of God was of such an overwhelming and destructive character as by its own force, and independently of the particular negligence alleged or shown, to produce the injury, there would be no liability, though there was some negligence on the part of the carrier. To create liability, it must have required the combined effect of the act of God and the concurring negligence of the party to produce the injury. Baltimore, etc., R. Co. v. Sulphur Springs, etc., District, 96 Penn. St. 65; Collier v. Valentine, 11 Mo. 299; Denny v. N. Y. Cent. Ry. Co., 13 Gray (Mass.), 481. So held also in Morrison v. Davis, 20 Penn. St. 171; 57 Am. Dec. 695, where a canal boat was delayed by the

accident, but not an act of God.[1] To relieve the carrier, the act of God must be the proximate and the sole cause of the disaster; if the carrier's negligence contributes in an active and operative manner, as for example, by unwarranted deviation from his proper route or by unjustifiable delay in forwarding, or where his vessel is unseaworthy, he is not relieved.[2] This is held in New York, Virginia, Wisconsin, California, Georgia, Kentucky, Massachusetts, Missouri, New Jersey.[3] But in some cases in Pennsylvania, Michigan, Massachusetts, Ohio and Missouri it has been held that the carrier is relieved if his own neglect contributed only in a very slight or remote

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lameness of a horse and caught in an extraordinary flood. The last two cases were approved in Railroad Co. v. Reeves, 10 Wallace (U. S. Sup. Ct.), 190, Mr. Justice Miller, giving the opinion, declaring that proof of *via major* excuses the defendant from showing that he was guilty of no negligence. But the doctrine of the last three cases was explicitly denied in Condit v. Grand Trunk R. Co., 54 N. Y. 505."

See also Cent., etc., Co. v. Kent, 87 Ga. 402; Railroad Co. v. Halloren, 53 Tex. 46; 37 Am. Rep. 744 (washout on railroad by unprecedented storm); Nitro-Glycerine case, 15 Wall. 524; Price v. Hartshorn, 44 N. Y. 94; 4 Am. Rep. 645 (violent storm necessitating jettison to save rest of cargo).

[1] The Morning Light, 2 Wall. 550; Myrick v. Hasey, 27 Me. 9; 46 Am. Dec. 583, and note 592. But if the colliding vessel was negligent the carrier is still responsible. Oakley v. Portsmouth, etc., Co., 11 Exch. 618.

[2] Wolf v. Am. Ex. Co., 43 Mo. 421; 97 Am. Dec., 406, and note 408; McGraw v. Balt. & O. R. Co., 18 W. Va., 361; 41 Am. Rep. 696. So where the carrier disobeys instructions to forward by rail and forwards by steamer and the goods are burned. Phil., etc., R. Co. v. Beck, 125 Pa. St. 620; 11 Am. St. Rep. 924. So in case of unnecessary deviation, as by going outside of Long Island instead of through the Sound, thus subjecting the vessel to storms. Crosby v. Fitch, 12 Conn. 410; 31 Am. Dec. 745. See Powers v. Davenport, 7 Blackf. 497; 43 Am. Dec. 100 (bridge breaking down); Hand v. Baynes, 4 Whart. 204; 33 Am. Dec. 54 (going down Delaware Bay instead of Chesapeake and Delaware canal). See note, with many cases, appended to *The Uhla*, (19 L. T. Rep., N. S. 89; 1 Eng. Rul. Cas. 210), 215.

[3] See note, 97 Am. Dec. 409.

degree,[1] on the theory that his liability extends only to natural and probable consequences.

Public enemies.— This term includes pirates, and any other armed force which cannot be overcome by the carrier, or the civil authorities, but does not embrace mobs, rioters or insurgents, nor any body except such as is organized to conduct public warfare. But although the carrier is liable for robbery of his carriages by a few bandits, or a band of rioters, he is deemed in recent times not to be liable for loss or damage naturally resulting from delay and consequent depreciation or injury caused by the intimidation and violence of a mob or strike of employees beyond the power of himself or the civil authorities to prevent or control.[2] Even as against public enemies and mobs and

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[1] See note, 97 Am. Dec. 409.

[2] Gulf, etc., Ry. Co. v. Levi, 76 Tex. 337; 18 Am. St. Rep. 45; Geismer v. Lake Shore, etc., Ry. Co., 102 N. Y., 563; 55 Am. Rep. 837. The early cases in England and this country were to the contrary, holding that a mob or riot, no matter how numerous, is not within the term "public enemy," even in respect to delay in the transportation. But now it is said in the case last cited "not only storms and floods, and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the track or disable the rolling stock, or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence," etc. See note, 11 Am. St. Rep. 365 and cases cited; Railroad Co. v. O'Donnell, 49 Ohio St. 489; 34 Am. St. Rep. 579. A distinction is still observed however between delay and destruction by a mob. In Missouri Pac. R. Co. v. Nevill, 30 S. W. Rep. 425, the Supreme Court of Arkansas held that a mob is not within the term "public enemies," where its act caused a failure to deliver the goods. They said: "Upon the second proposition, the authorities are practically one way. Where there is a total failure to deliver goods, occasioned by the 'depredations or the violence of mobs, rioters, strikers, thieves and the like,' the carrier is liable; for, says Mr. Hutchinson, 'by the word 'enemies' in this connection is to be understood the public enemies of the country of the carrier and not of the owner of the goods.' Hutch. Carr. 203, and authorities there cited." So in Chevallier v. Straham, 2 Tex. 115; 47 Am. Dec. 639, it was said: "He is

the like, the carrier must use reasonable diligence and precaution; so for example he would be liable if he negligently exposed the goods to capture by the public enemy, or being warned of a mob or a strike, or a "hold up," he failed to hasten the transportation or use other reasonable precautions within his power.[1]

Inherent defects.— The carrier is excused if the loss or injury is solely through inherent defects or qualities in the goods themselves. In the case of perishable property, like fruit, the carrier is not responsible for the deterioration if it occurs without any negligence or delay on his part.[2] In like manner the carrier of animals is not responsible for injuries which they may sustain through their own natural or vicious propensities, unless his neglect or fault

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liable not only for losses occasioned by secret theft or embezzlement, but for those inflicted by highway robbery, by the spoliation and outrages of mobs, rioters and insurgents." And in Gulf, etc., Ry. Co. v. Levi, *supra*, the distinction is explicitly recognized as follows: "The same reasons do not apply when the thing is actually transported and delivered, although when delivered it may be greatly diminished in value by a fall in the market price," etc. Thieves, tramps and robbers are not public enemies within the rule exempting bailees. State v. Moore, 74 Mo. 413; 41 Am. Rep. 322. The reason for the distinction is that a total failure to deliver may be due to the carrier's fault or complicity, but by delivering the goods, although in a damaged condition, the carrier shows his good faith. Marauding Indians are "public enemies." Holladay v. Kennard, 12 Wall. 254.

[1] Caldwell v. So. Ex. Co., 1 Flip. 85.

[2] Am. Ex. Co. v. Smith, 33 Ohio St. 511; 31 Am. Rep. 561, and cases in note p. 567. Beard & Sons v. Ill. Cent. Ry. Co., 79 Iowa, 518; 18 Am. St. Rep. 381; Gulf, etc., Ry. Co. v. Levi, 76 Tex. 337; 18 Am. St. Rep. 45. Mr. Schouler says (Bailments, 397): "For example, where liquors evaporate, effervesce, sour, or burst the bottles, or leak out of the casks in which they were consigned (for whose imperfections the carrier is no more answerable than for their own inherent qualities), the loss is not the carrier's unless he occasioned it by remissness of duty. Nor where meat taints, lard melts, oranges and lemons rot, salt loses its savor or eggs grow stale, is the carrier necessarily under obligation to replace the goods in quantity or quality or stand to the loss in damages."

contributes to it.[1] But the carrier is not excused if his own fault, either in the care of the property by the way, or by unreasonable delay in forwarding or delivering it, contributes to the loss or injury. And so, receiving animals for transportation, he is bound to provide suitable carriages, and to feed and water them on the way.[2]

Conduct of the shipper.— If the misconduct or carelessness of the shipper proximately occasions the loss or

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[1] Blower v. Gt. W. Ry. Co., L. R., 7 C. P. 655; 5 Eng. Rul. Cas. 343, with notes; Kendall v. London, etc., Ry. Co., L. R., 7 Ex. 373; Richardson v. N. E. Ry. Co., L. R., 7 C. P. 75; Coupland v. Housatonic R. Co., 61 Conn. 531; 15 L. R. A. 534; Agnew v. Steamer Contra Costa, 27 Cal. 425; 87 Am. Dec. 87; Clarke v. Rochester, etc., R. Co., 14 N. Y. 570; 67 Am. Dec. 205, and note, 208; Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180; 27 Am. Rep. 28; Michigan, etc., R. Co. v. McDonough, 21 Mich. 165; 4 Am. Rep. 466; Kansas, etc., Ry. Co. v. Nichols, 9 Kans. 235; 12 Am. Rep. 494; Louisville, etc., R. Co. v. Hedger, 9 Bush (Ky.), 645; 15 Am. Rep. 740; Bamberg v. South Car., etc., R. Co., 9 S. C. 61; 30 Am. Rep. 13; Evans v. Fitchburg R. Co., 111 Mass. 142; 15 Am. Rep. 19; Lindsley v. Chicago, etc., Ry. Co., 36 Minn. 539; 1 Am. St. Rep. 692; Rixford v. Smith, 52 N. H. 355; 13 Am. Rep. 42, and note, 53. In Clarke v. Rochester, etc., R. Co., *supra*, Denio, Ch. J., observed: "But the carrier of animals, by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety"—as in the case of inanimate freight—"they may die of fright, or by refusing to eat, or they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may kill each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge him with the loss. The reasons stated by Marshall, Ch. J., in pronouncing the judgment of the Supreme Court of the United States, in Boyce v. Anderson (2 Peters, 150), have considerable application to this case. It was held that the carrier of slaves was not an insurer of their safety, but was liable only for ordinary neglect; and this was put mainly upon the ground that he could not have the same absolute control over them that he has over inanimate matter." See also Louisville, etc., Ry. Co. v. Bigger, 66 Miss. 319; Railway Co. v. Wynn, 88 Tenn. 320; Gulf, etc., Ry. Co. v. Trawick, 80 Tex. 270; Agnew v. Steamer Contra Costa, 27 Cal. 425; 87 Am. Dec. 87.

[2] Covington Stock Yards Co. v. Keith, 139 U. S. 128.

injury, without the carrier's fault, the carrier is not responsible. This is exemplified by the shipper's carelessness in packing or securing goods or in furnishing the vessels in which they are contained, occasioning breakage or leakage, or in securing animals. And so when the damage is occasioned by the shipper's misdirection of the goods.[1]

Public authority.— The carrier is relieved if the goods are taken away from him by the act or mandate of the public authorities, judicial or executive. As where they are taken upon valid legal process, or by the police power of the State are seized, injured, or destroyed; for example, when infected with contagious disease, or obnoxious to the excise laws, or where the goods are arms and amunition intended to assist an insurrection or armed and violent strike.[2]

Liability of carrier beyond his own route.—As has been shown (*ante*, p. 96), the carrier is not bound to accept goods

[1] Congar v. Chicago, etc., Ry. Co., 24 Wis. 157; 1 Am. Rep. 164; Ross v. Troy & B. R. Co., 49 Vt. 364; 24 Am. Rep. 144; Erie Ry. Co. v. Wilcox, 84 Ill. 239; 25 Am. Rep. 451. In Richardson v. North Eastern Ry. Co., L. R., 7 C. P. 75, a valuable greyhound was delivered to the company with a collar and strap, and during a change of trains a servant of the company secured that strap to a fixture on the platform. The dog slipped the collar, and was run over by a train. It was held, that as the owner by delivering the dog with the collar and strap had indicated them as the proper means of securing him, the company were not responsible.

[2] Bliven v. Hudson R. R. Co., 36 N. Y. 403; Railroad Co. v. O'Donnell, 49 Ohio St. 489; 34 Am. St. Rep. 579; Jewett v. Olsen, 18 Oreg. 419; 17 Am. St. Rep. 745; Pingree v. Detroit, etc., Ry. Co., 66 Mich. 143; 14 Am. St. Rep. 479; and cases cited. In such cases the carrier is bound immediately to notify the shipper of the taking; Jewett v. Olsen, above; Bliven v. Hudson R. R. Co., above; and the seizure must be apparently valid against the shipper; Edwards v. White, etc., Co., 104 Mass. 159; Gibbons v. Farwell, 63 Mich. 344; 6 Am. St. Rep. 301. And the carrier is liable if he surrenders to an officer without a warrant. Bennett v. Am. Ex. Co., 83 Me. 236; 23 Am. St. Rep. 774.

to be delivered at a place beyond the terminus of his own route. But he may contract to do so, and thus render himself responsible as a common carrier for the whole route and for delivery at the alternate destination.[1] On the other hand he may by special contract limit his liability to his own route, and absolve himself by safe delivery to the next connecting carrier.[2] The effect of receiving goods marked for carriage to a point beyond his own line is differently viewed in England and in America. In England this implies a contract for transportation to their destination, although no connection with other carriers is shown and the price for complete carriage is not prepaid.[3] This doctrine is adopted in a few of the United States;[4] but according to the greater weight

[1] Muschamp v. Lancaster & P. Ry. Co., 8 M. & W., 421; Railroad Co. v. Pratt, 22 Wallace, 123; Burtis v. Buffalo, etc., R. Co., 24 N. Y. 269; Penn. R. Co. v. Berry, 68 Pa. St. 272; and other cases in note, 72 Am. Dec. 231. Connecticut holds the contrary: Elmore v. Naugatuck R. Co., 23 Conn. 457; 63 Am. Dec. 143.

[2] Railroad Co. v. Pratt, 22 Wall. 123; Kent v. Midland Ry. Co., L. R., 10 Q. B. 1; Reed v. U. S. Ex. Co., 48 N. Y. 462; 8 Am. Rep. 561; Am. Ex. Co. v. Second Nat. Bk., 69 Pa. St. 394; 8 Am. Rep. 268; Burroughs v. Norwich, etc., R. Co., 100 Mass. 26; 1 Am. Rep. 78, and other cases in note, 72 Am. Dec. 231–232.

[3] Muschamp v. Lancaster, etc., Ry. Co., 8 M. &. W. 421.

[4] Mobile, etc., R. Co. v. Copeland, 63 Ala. 219; 35 Am. Rep. 13; Bennett v. Filyaw, 1 Fla. 403; Hawley v. Screven, 62 Ga. 347; 35 Am. Rep. 126; Mulligan v. Ill. Cent. R. Co., 36 Iowa, 181; 14 Am. Rep. 514; Gray v. Jackson, 51 N. H. 19; 12 Am. Rep. 1; Bradford v. Railroad, 7 Rich. L. 201; 62 Am. Dec. 411; East Tenn. etc., R. Co. v. Rogers, 6 Heisk. 143; 19 Am. Rep. 589; Ill. Cent. R. Co. v. Frankenberg, 54 Ill. 88; 5 Am. Rep. 92; and other cases in note, 72 Am. Dec. 234. In the New Hampshire case cited above, the court say: "The great value of commodities transported over these connected lines; the increased risk of loss and damage from the immense distances over which they carry goods; the fact that where goods are once intrusted to carriers on these long routes, they are placed beyond all control and supervision of the owners — are cogent reasons for holding those who associate in these connected lines to a rule that shall give effectual and convenient remedy to the owner

and number of authorities such a circumstance implies only a contract to deliver to the next succeeding carrier.[1]

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whose goods have been lost or damaged in any part of the line Any rule which should have the effect to defeat or embarrass the owner's remedy would be in direct conflict with the principles and whole policy of the common law." In the Illinois case cited above the court observe: "It would be a great hardship indeed to compel the consignor of a few barrels of flour, delivered to a railroad in this State, marked to New York city, and which are lost in the transit, to go to New York or to the intermediate lines of road, and to spend days and weeks perhaps in endeavoring to find out on what particular road the loss happened, and having ascertained it, in the event of a refusal to adjust the loss, to bring a suit in the court of New York for his damages. Far more just would it be to hold the company who received the goods in the first instance as the responsible party, and the intermediate roads its agents to carry and deliver; and it is the more reasonable and just, for all railroads have facilities not possessed by a consignor of tracing losses of property conveyed by them, and all have or can have running connections with each other. Above all, when it is considered the receiving company can at the outset relieve itself from its common-law liability by a special and definite agreement, such a rule cannot prejudice them." Lawson (Cont. Carr § 240), prefers the English rule for convenience and justice, but admits that the weight of authority here is the other way.

[1] Railroad Co. v. Manuf. Co., 16 Wall 318; Elmore v. Naugatuck, etc., R. Co., 23 Conn. 457; 63 Am. Dec. 143; Burroughs v. Norwich, etc., R. Co., 100 Mass. 26; 1 Am. Rep. 78; Root v. Gt. W. R. Co., 45 N. Y. 524; Clyde v. Hubbard, 88 Pa. St. 358, and cases in Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Rhode Island and Vermont, cited in note, 72 Am. Dec. 236; Lawson Cont. Carr. § 238, and discussion in Van Santvoord v. St. John, 6 Hill, 157. In view of the modern mode of conducting the carrying business, the following remarks of Senator Bockee in the last case will be found amusing: "The rule established by the supreme court, that the name of a place marked on a box of merchandise implies a contract to deliver at such place, without any reference to the nature and extent of the business and employment of the carrier, is fraught with consequences most alarming to all who are engaged in freighting and transportation. Suppose the box had been marked 'Brown's Hole, Rocky Mountains.' The supreme court say there is an implied contract to deliver the goods at that place. And as it is the duty of every man faithfully to fulfil his contracts, the plaintiff in error must abandon his ordinary avocations and business, leave the delights of domestic association, embark with his dear-bought freight, and follow the long lines of internal navi-

On the one hand is urged the inconvenience of compelling the consignor to ascertain who is in fault and of sending him abroad to litigate, and the injustice of imposing on him the care of his goods at a distance in the hands of strange persons; on the other, the injustice of placing upon the receiving carrier the burden of responsibility for the negligence of persons over whom he has no control.

If however the connecting carriers have any arrangement of a partnership character, by which they share profits and losses, and do not merely divide the freight money in agreed proportions, the consignor may sue them jointly or severally.[1]

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gation till he reaches the head waters of the Yellow Stone. Then he must traverse the vast desert with Indian horses and pack saddles, exposed to famine, to the wintry storms, to wild beasts and savages; and if Providence should protect him through every danger, he returns, after years of suffering, a wornout beggar to a ruined home. This may be considered an extreme case; yet I conceive it is no more than carrying out the principle to its legitimate and certain results. At the same time that this receipt was given, another receipt was given for a box of merchandise marked 'G. S. Hubbard, Chicago, Ill.' The same principle which makes the defendants below liable as common carriers to Little Falls, would extend their liability to Chicago, and even to Oregon and China. If they receive a chest of tea marked 'Houqua, Canton,' they must carry it there. The doctrine is too ruinous and monstrous in its consequences to remain for one hour the law of the land."

"If a contract is to be implied merely from a mark upon the box and without reference to the nature of the employment or business of the party, then every carman who receives a marked bale of merchandise is in great danger. If the fatal name of 'Peckagama' or 'Chegoimegon' appear upon the bale, the carman in the city as well as the freighter on the Hudson will be held liable as common carrier until the goods shall reach their remote destination. Such cannot be the law. The practical inconvenience and injustice of such a rule would be too great to be endured."

[1] Champion v. Bostwick, 18 Wend. 175; 31 Am. Dec. 376; Bradford v. S. C. R. Co., 7 Rich. L. 201; 62 Am. Dec. 411; Block v. Fitchburg, etc., R. Co., 139 Mass. 308; Ins. Co. v. R. Co., 104 U. S. 146; Ellsworth v. Tartt, 26 Ala. 733; 62 Am. Dec. 749; Converse v. Norwich, etc., T. Co, 33 Conn. 166; Irvin v. Nashville, etc., R. Co., 92 Ill. 103; 34 Am. Rep. 116; Wolf v. Hough, 22 Kans. 659;

It is difficult to formulate any rules for determining what constitutes an implied contract for through-carriage. It is not implied by prepayment of freight money to the destination,[1] but it may be from words in a bill of lading or shipping receipt, short of an express contract, but indicative of an undertaking to deliver at the destination, such as "through-freight contract," "to be delivered in good order as addressed," "to be delivered as addressed on the margin," "to be landed on India wharf" (at the destination), and the like.[2] In such cases the contract so to deliver will be held to prevail even as against words of limitation of liability to the first carrier's route.[3]

Although there is a contract for through-carriage, the shipper is not bound to resort to the first carrier for redress, but may sue any connecting carrier at fault. This differs from the English doctrine.[4] But in such case the first carrier may be held for loss or damage on any connecting line.[5]

Limitation of liability.—Not only may the carrier limit his responsibility to loss or damage occurring on his own line, but he may limit the extent of that liability. This was denied in a few cases at an early day in this

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Merrick v. Gordon, 20 N. Y. 93; Hot Springs R. v. Trippe, 42 Ark. 465; 48 Am. Rep. 65.

[1] Myrick v. Mich. Cent. R. Co., 107 U. S. 102; Ætna Ins. Co. v. Wheeler, 49 N. Y. 616; Piedmont Manuf. Co. v. Columbia, etc., R. Co., 19 S. C. 353.

[2] Cutts v. Brainerd, 42 Vt. 566; 1 Am. Rep. 353; Toledo, etc., Ry. Co. v. Merriman, 52 Ill. 123; 4 Am. Rep. 590; Wahl v. Holt, 26 Wis. 703; Schneider v. Evans, 25 Wis. 241; 3 Am. Rep. 56; Parmelee v. West. Trans. Co., 26 Wis. 439; Hansen v. Flint, etc., R. Co., 73 Wis. 346; 9 Am. St. Rep. 791.

[3] Toledo, etc., Ry. Co. v. Merriman, *supra*.

[4] Packard v. Taylor, 35 Ark. 402; 37 Am. Rep. 37; Nashua Lock Co. v. Worcester, etc., R. Co., 48 N. H. 339; 2 Am. Rep. 242.

[5] Railroad Co. v. Pratt, 22 Wall. 123; Nashua Lock Co. v. Nashua & W. R. Co., *supra*; Hart v. Rens., etc., R. Co., 8 N. Y. 37; 59 Am. Dec. 447; Baltimore, etc., S. Co. v. Brown, 54 Pa. St. 77.

country,[1] but the rule is now settled the other way, and the only question is as to the mode in which it may be done.

Notice.—At an early day in this country it was held in a very few cases that it might be done by notice of the limitation, either general or special,[2] but the contrary is now probably universally held.[3]

It is settled however that the carrier may by notice to the consignor limit his liability in any event to a specified amount, in the absence of information that the goods are of greater value.[4] And so the carrier may impose the condition by notice that any claim for damages must be presented within a specified reasonable time.[5]

[1] Gould v. Hill, 2 Hill, 263, and see Cowen's opinion in Cole v. Goodwin, 19 Wend. 251; 32 Am. Dec. 470.

[2] Laing v. Colder, 8 Pa. St. 479; Atwood v. Reliance T. Co., 9 Watts, 87; 34 Am. Dec. 503; Penn. R. Co. v. Schwarzenberger, 45 Pa. St. 208; 84 Am. Dec. 490.

[3] Fish v. Chapman, 2 Ga., 349; 46 Am. Dec. 393 (an extensive and excellent history of the subject); Railroad Co. v. Manuf. Co., 16 Wallace, 318; So. Ex. Co. v. Caperton, 44 Ala. 101; 4 Am. Rep. 118; Dorr v. N. J. S. Nav. Co., 11 N. Y. 485; Judson v. Western R. Co., 6 Allen, 486; Little v. Boston, etc., R. Co., 66 Me. 239; and cases in Mississippi, New Hampshire, Michigan, Vermont, Connecticut, Indiana, Illinois, Kentucky, Ohio, Missouri, and West Virginia, cited in notes, 5 Eng. Rul. Cas. and 32 Am. Dec. 502.

[4] Cole v. Goodwin, 19 Wend., 251; 32 Am. Dec. 470 (by Cowen, J.); Orange Co. Bk. v. Brown, 9 Wend. 85; 24 Am. Dec. 129; Judson v. West. R. Co., 6 Allen, 486; Moses v. Boston, etc., R. Co., 24 N. H. 71; Erie R. Co. v. Wilcox, 84 Ill. 239; 25 Am. Rep. 451; Pac. Ex. Co. v. Foley, 46 Kans. 457; 12 L. R. A. 799; 26 Am. St. Rep. 107. (In this case the carrier is not bound to inquire as to the value; the shipper's silence estops him. Magnin v. Dinsmore, 62 N. Y. 35; 20 Am. Rep. 442, 70 N. Y. 410; 26 Am. Rep. 608. But in the absence of such notice or inquiry he cannot detain the goods for additional compensation to that agreed. Baldwin v. Liverpool, etc., S. Co., 74 N. Y. 125; 30 Am. Rep. 277.)

[5] South. Ex. Co. v. Hunnicutt, 54 Miss. 566; 28 Am. Rep. 385; Express Co. v. Caldwell, 21 Wall. 264; but the time must be reasonable; Capehart v. Seaboard, etc., R. Co., 81 N. C. 438; 31 Am. Rep. 505, and note 509.

Contract.—But it is now equally well settled, in spite of an early strong aversion to the rule,[1] that the carrier may by contract, express or implied, written or oral, exempt himself from his extraordinary liability as insurer.[2] The contract for exemption may be in the form of a condition in the receipt or bill of lading, but this must be assented to by the shipper. The acceptance of a receipt with an unsigned general notice of limitation printed on the back, does not imply an acceptance or assent by the shipper.[3] Ordinarily his acceptance of such a document without objection is sufficient to raise a conclusive presumption of his assent.[4] And the shipper will not be

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[1] Per Cowen in Cole v Goodwin, *supra;* and see Indianapolis, etc., R. Co. v. Allen, 31 Ind. 394.

[2] N. J. S. Nav Co. v. Merch. Bk., 6 How. 344; Dorr v. N J S. Nav Co., 11 N. Y. 485; 62 Am. Dec. 125, and note, 129; Grace v. Adams, 100 Mass. 505; 97 Am. Dec. 117; 1 Am Rep. 131; Buck v. Penn. R. Co., 150 Pa. St. 170; 30 Am. St. Rep 800; Graham v. Davis, 4 Ohio St. 362; 62 Am. Dec. 285; So Ex Co. v. Purcell, 37 Ga. 103; 92 Am. Dec. 53, and note, 56; Merch. Disp. Co v. Bloch Bros, 86 Tenn. 392; 6 Am. St. Rep. 847; Witting v. St. Louis, etc., Ry. Co, 101 Mo. 631; 20 Am. St. Rep. 636; Chic., etc., Ry. Co. v. Chapman, 133 Ill. 96; 23 Am. St. Rep. 587, and note, 893; Pac. Ex. Co. v. Foley, 46 Kans. 457, 26 Am. St. Rep. 107; 12 L. R. A. 799; Terre Haute, etc., R Co v. Sherwood, 132 Ind 129, 32 Am. St. Rep., 239; Ballou v. Earle, 17 R. I. 441; 33 Am St. 881; 14 L. R. A. 433; Alair v. Nor. Pac. R. Co., 53 Minn. 160; 39 Am. St. Rep. 588; Smith v. N. C. R. Co., 64 N. C. 235; Richmond, etc., R. Co. v. Payne, 86 Va. 481; 6 L. R. A. 849; Louisville, etc., R. Co. v. Gilbert, 88 Tenn. 430; 7 L. R. A. 162.

[3] Railroad Co. v. Manuf. Co. 16 Wall. 318.

[4] Grace v. Adams, *supra;* Mulligan v. Ill. Cent. R. Co., 36 Iowa, 181; 14 Am. Rep. 514; Kirkland v. Dinsmore, 62 N. Y. 171; 20 Am. Rep. 475; Germania F. Ins. Co. v. Memphis, etc., R. Co., 72 N. Y. 90; 28 Am. Rep. 113; Pac. Ex. Co. v. Foley, *supra;* Steele v. Townsend, 37 Ala. 247; 79 Am. Dec. 49; Ballou v. Earle, 17 R. I. 441; 33 Am. St. Rep. 881; St. Louis, etc., Ry. Co. v. Weakly, 50 Ark. 397; 7 Am. St. Rep. 104; Durgin v. Am. Ex. Co., — N. H. —; 9 L. R A. 453. The exemption may extend to the mode of delivery as well as to the mode of carriage. Thus in Constable v. Nat. St. Co.,

permitted to show that he did not read the document nor know the condition,[1] nor even that he could not read it,[2] nor that it differed from a previous oral agreement for the same carriage.[3] The rule is the same when there is no such condition in writing, but the shipper has made previous shipments with knowledge of certain regulations on the part of the carrier.[4]

[This rule does not apply as to conditions as to luggage in passenger tickets or on checks. This will be considered hereafter].

The carrier however must give the shipper a reasonable opportunity to learn the contents of the document containing the limitation. He may not impose it on him in the dark where he could not read it,[5] nor in a language unknown to the receiver,[6] nor by fraud,[7] nor insert obscure abbreviations.[8]

The carrier may not even by contract absolve himself from the consequences of his own negligence or that of his

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154 U. S. 51, the following was held valid: "The United States treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss or injury."

[1] Grace v. Adams, *supra;* Kirkland v. Dinsmore, *supra.*

[2] O'Regan v. Cunard S. Co., 160 Mass. 356; 39 Am. St. Rep. 484.

[3] McFadden v. Mo. P. Ry. Co., 92 Mo. 343; 1 Am. St. Rep. 721; Hill v. Syracuse, etc., R. Co., 73 N. Y. 351; 29 Am. Rep. 163.

[4] Miller v. Georgia, etc., Co., 88 Ga. 563; 30 Am. St. Rep. 170. In Illinois, however, the acceptance of a limited bill or receipt is not conclusive, but is evidence for the jury. Adams Ex. Co. v. Stettaners, 61 Ill. 184; 14 Am. Rep. 57.

[5] Blossom v. Dodd, 43 N. Y. 264; 3 Am. Rep. 701.

[6] Camden, etc., R. Co. v. Baldauf, 16 Pa. St. 67; 55 Am. Dec. 481.

[7] Black v. Wabash, etc., Ry. Co., 111 Ill. 351; 53 Am. Rep. 628; Hadd v. U. S., etc., Ex. Co., 52 Vt. 335; 36 Am. Rep. 757.

[8] Rosenfeld v. Peoria, etc., R. Co., 103 Ind. 121; 53 Am. Rep. 500.

servants,[1] but even in this case he may contract for limitation of liability to a specified amount.[2]

The agreement at the time of shipment is conclusive. So if goods are shipped under an oral agreement, the subsequent acceptance of a bill of lading, without assent to its provisions, does not preclude the shipper from enforcing the oral agreement.[3] And if the carrier gives a receipt, with an unsigned contract to carry on certain conditions indorsed upon it, and stating that a bill of lading is to be given thereafter, this does not constitute a special contract limiting the carrier's liability.[4]

The limitation is always matter of agreement, subject to the shipper's express or implied assent. The carrier cannot impose it on the shipper against his will, but is bound, in the absence of his assent, to carry under his common-law responsibility, is liable to an action for refusal,

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[1] Railroad v. Lockwood, 17 Wall. 357; Guillaume v. Hamburgh & Am. P. Co., 42 N. Y. 212; 1 Am. Rep. 512; Steinweg v. Erie Ry. Co., 43 N. Y. 123; 3 Am. Rep. 673; Westcott v. Fargo, 61 N. Y. 542; 19 Am. Rep. 300; Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180; 27 Am. Rep. 28; Mich. S. R. Co. v. Heaton, 37 Ind. 448; 10 Am. Rep. 89; Empire Trans. Co. v. Wamsutta Oil Co., 63 Pa. St. 14; 3 Am. Rep. 515; School Dist. v. Boston, etc., R. Co., 102 Mass. 552; 3 Am. Rep. 502; Erie Ry. Co. v. Wilcox, 84 Ill. 239; 25 Am. Rep. 451; Merch. D. & T. Co. v. Cornforth, 3 Colo. 280; 25 Am. Rep. 757; Galt v. Adams Ex. Co., MacArthur & Mackey, 124; 48 Am. Rep. 742; Shriver v. Sioux City, etc., R. Co., 24 Minn. 506; 31 Am. Rep. 353; Ryan v. M. K. & T. Ry. Co., 65 Tex. 13; 57 Am. Rep. 589; Penn. R. Co. v. Raiordon, 119 Pa. St. 577; 4 Am. St. Rep. 670; Chicago, etc., R. Co. v. Witty, 32 Neb. 275; 29 Am. St. Rep. 436; Railroad v. Dies, 91 Tenn. 177; 30 Am. St. Rep. 871; Pacific Ex. Co. v. Foley, 46 Kans. 457; 26 Am. St. Rep. 107; Johnson v. Ala., etc., Ry. Co., 69 Miss. 191; 30 Am. St. Rep. 534; and see 13 L. R. A. 362; 17 ibid. 339. (The New York cases hold a different doctrine as to passengers riding on free passes, as to which see a subsequent chapter.)

[2] Ballou v. Earle, *supra;* Richmond, etc., R. Co. v. Payne, *supra;* Louisville, etc., R. Co. v. Gilbert, *supra.*

[3] Bostwick v. Baltimore, etc., R. Co., 45 N. Y. 712.

[4] Merchants' D. T. Co. v. Furthmann, 149 Ill. 66; 41 Am. St. Rep. 265.

and may be compelled to carry. As for example, where the consignor has no choice but to ship with him.[1]

Any limitation in the first carrier's contract for through-carriage enures to the benefit of all the connecting carriers,[2] but where he undertook only to carry to the end of his own route, the limitations in his favor do not enure to the benefit of the succeeding carriers, nor can the first carrier provide that they shall. The common-law liability in that case attaches to the succeeding carriers.[3]

Statutes.—In some states statutes have been enacted prohibiting or regulating the carrier's power to stipulate for exemption. Under such a prohibitory statute it has been held that the carrier may still stipulate that he shall have the benefit of any insurance by the owner.[4]

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[1] Railway Co. v. Cravens, 57 Ark. 112; 38 Am. St. Rep. 230; 18 L. R. A. 527; Kansas P. Ry. Co. v. Nichols, 9 Kans. 235, 12 Am. Rep. 494, and note, 500; Adams Ex. Co. v. Nock, 2 Duval, 562; 87 Am. Dec. 510; West. Trans. Co. v. Newhall, 24 Ill. 466; 76 Am. Dec. 760; Maybin v. S. C. R. Co., 8 Rich. L. 240; 64 Am. Dec. 753; Fish v. Chapman, *supra;* Doty v. Strong, 1 Pinney, 313; 40 Am. Dec. 773; Harvey v. Conn., etc., R. Co., 124 Mass. 421; 26 Am. Rep. 673; Kimball v. Rutland, etc., R. Co., 26 Vt. 247; 62 Am. Dec. 567

[2] Railroad Co. v. Androscoggin Mills, 22 Wall. 594; Manhattan Oil Co v. Camden, etc., R. Co., 54 N. Y., 197, Halliday v. St. Louis, etc., Ry. Co., 74 Mo. 159; 41 Am. Rep 309.

[3] Camden, etc., R. Co. v. Forsyth, 61 Pa. St. 81; Babcock v. Lake Shore, etc., Ry. Co., 49 N. Y., 491; Taylor v. Little Rock, etc., R. Co., 39 Ark. 148; Merch. D. T. Co. v. Bolles, 80 Ill. 473; Bancroft v. Merch. D. T. Co., 47 Ia. 262; 29 Am. Rep., 482, Martin v. Am. Ex. Co., 19 Wis. 336; Adams Ex. Co. v. Harris, 120 Ind. 73, 16 Am. St. Rep. 315.

[4] British, etc., Ins. Co. v. Gulf, etc., Ry. Co., 63 Tex. 475; 51 Am. Rep. 661.

CHAPTER XIII.

CARRIERS OF GOODS — DUTIES IN TRANSPORTATION.

As to transportation, in the absence of special contract, the essence of the carrier's agreement is to carry the goods safely, by the usual route, and with reasonable promptness.

Care.—The carrier is bound to furnish a road-worthy vehicle, or a sea-worthy vessel, and a well-constructed roadway.[1] The master of a vessel may not carry the goods on deck,[2] except by the shipper's express or implied consent,[3] or by custom.[4] He is bound to protect them from rain,[5] and to stow them in a careful and approved manner.[6]

The degree of care must be adapted to the character of the goods, if that is evident or is disclosed by marks upon them. The carrier must furnish refrigerator-cars for butter, if he accepts it.[7] He is liable for disregard of directions on or concerning the goods, as in case of fragile

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[1] Backhouse v. Sneed, 1 Murphy, 173; Lyon v. Mells, 5 East, 428; 5 Eng. Rul. Cas. 266, and note, 272; Putnam v. Wood, 3 Mass. 481; 3 Am. Dec. 179; Work v. Leathers, 97 U. S. 379; Camden, etc., Co. v. Burke, 13 Wend, 611; 28 Am. Dec. 488; Seger v. Town, 22 Conn. 290.

[2] Dodge v. Bartol, 5 Greenl. 286; 17 Am. Dec. 233; Lenox v. U. S. Ins. Co., 3 Johns. Cas. 178; note, 41 Am. Dec. 284.

[3] Van Horn v. Taylor, 2 La. Ann. 587; 46 Am. Dec. 558.

[4] Harris v. Moody, 30 N. Y. 266; 86 Am. Dec. 375.

[5] Klauber v. Am. Ex. Co., 21 Wis. 21; 91 Am. Dec. 452; even if the shipper consents to carriage on deck, Schwinger v. Raymond, 83 N. Y. 192; 38 Am. Rep. 415.

[6] Montgomery v. Ship, etc., 6 La. Ann. 410; 54 Am. Dec. 562; Clark v. Barnwell, 12 How. 272.

[7] Beard v. Ill. Cent. R. Co., 79 Iowa, 518; 7 L. R. A. 280; 18 Am. St. Rep. 381. See Peck v. Weeks, 34 Conn. 145.

or fluid articles;[1] but probably in the absence of such directions he is bound only to ordinary care.[2] If goods become wet in transit, he is bound to use every reasonable means to arrest the injury and diminish the damages.[3] He must feed and water live-stock,[4] and relieve it from confinement on a long route.[5] The agreement of the shipper that he has examined and accepts the car as sufficient does not estop him.[6]

The carrier is liable for thefts by strangers and for embezzlements by his employees,[7] and so for provisions consumed by the passengers through necessity on a prolonged voyage.[8]

The carrier is bound to skill in navigation;[9] if necessary, he must take a pilot.[10] But he is only bound to the exercise of reasonable and common skill, sagacity and foresight; so for example he is not bound to anticipate an unprecedented flood.[11]

If perishable property is in danger of spoiling owing to delay by a freshet, he may sell it.[12]

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[1] Johnson v. N. Y. Cent. Trans. Co., 33 N. Y. 610; 88 Am. Dec. 416; Hastings v. Pepper, 11 Pick. 41.

[2] Nelson v. Woodruff, 1 Black, 156.

[3] Bird v. Cromwell, 1 Mo. 81; 13 Am. Dec. 470 (to dry coffee); Ewart v. Street, 2 Bailey, 157; 23 Am. Dec. 131; Chouteaux v. Leech, 18 Pa. St. 224; 57 Am. Dec. 602 (wet furs).

[4] Internat. etc., Ry. Co. v. McRae, 82 Tex. 614; 27 Am. St. Rep. 926.

[5] Johnson v. Ala., etc., Ry. Co., 69 Miss. 191; 30 Am. St. Rep. 534.

[6] Railroad v. Dies, 91 Tenn. 177; 30 Am. St. Rep. 871. Otherwise if he accepts and without objection loads a ca. not "bedded." East Tenn., etc., R. Co. v. Johnston, 75 Ala. 596; 51 Am. Rep. 489.

[7] Schieffelin v. Harvey, 6 Johns. 170; 5 Am. Dec. 206; Forward v. Pittard, 1 T. R. 27; 1 Eng. Rul. Cas. 216.

[8] Moses v. Sun Mut. Ins. Co., 1 Duer, 159.

[9] Elliott v. Rossell, 10 Johns. 1; 6 Am. Dec. 306.

[10] Williams v. Grant, 1 Conn. 487; 7 Am. Dec. 235; Fergusson v. Brent, 12 Md. 9.

[11] Nashville, etc., R. Co. v. David, 6 Heisk. 261; 19 Am. Rep. 594.

[12] Am. Ex. Co. v. Smith, 33 Ohio St. 511; 31 Am. Rep. 561.

Deviation.—If a particular course is directed by the shipper, the carrier must pursue it at all hazards. As where being directed to carry by rail he forwards by steamer; or being directed to send by one line of boats he sends by another.[1] And if the carrier by choice deviates from his usual route, it is at his peril, without regard to the question whether the damage would not have occurred if he had kept his usual course.[2] For example, where to avoid ice, a sloop went outside of Long Island instead of through the Sound;[3] and where a wagoner took a circuitous route in order to go by his own house,[4] and where goods destined for Mattoon by Indianapolis were carried by Chicago, and there consumed in the great fire;[5] and where on information that the locks were out of order, a vessel proceeded down Delaware bay instead of through the Chesapeake and Delaware canal.[6] If the carrier has a choice of routes he is not justified in adopting the more expeditious when he knows it is the more dangerous.[7] Taking another vessel in tow, when not in distress, constitutes a deviation.[8]

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[1] Phila., etc., R. Co. v. Beck, 125 Pa. St. 620; 11 Am. St. Rep. 924; Johnson v. N. Y. Cent. Tr. Co., 33 N. Y. 610; 88 Am. Dec. 416; Goodrich v. Thompson, 44 N. Y. 324, and so if he violates his contract to carry without change of cars. Stewart v. Merch. D. T. Co., 47 Iowa, 229. But an agreement to carry "all rail" is not broken by necessary ferriage. Maghee v. Camden, etc., R. Co., 45 N. Y. 514; 6 Am. Rep. 124.

[2] Davis v. Garrett, 6 Bing. 716; 5 Eng. Rul. Cas. 273; Lawrence v. McGregor, Wright, 193; Phillips v. Brigham, 26 Ga. 617; 71 Am. Dec. 227; Smith v. Whitman, 13 Mo. 352. *Contra* (unsound), Maghee v. Camden, etc., R. Co., 45 N. Y. 514; Lawson on Cont. Carr. § 11, says, "it is difficult to see how such proof would be possible."

[3] Crosby v. Fitch, 12 Conn. 410; 31 Am. Dec. 745.

[4] Powers v. Davenport, 7 Blackf. 497; 43 Am. Dec. 100.

[5] Merch. D. T. Co. v. Kahn, 76 Ill. 520;

[6] Hand v. Baynes, 4 Whart. 204; 33 Am. Dec. 54.

[7] Express Co. v. Kountze Bros., 8 Wall. 342.

[8] Natchez Ins. Co. v. Stanton, 2 Sm. & Marsh. 340; 41 Am. Dec. 592.

He may however deviate from his usual route to save the goods, and it is his duty to do so.[1] But a mere apprehension of danger does not justify deviation.[2] If his contract allows him to carry by water, he is not bound to carry by rail, when the water route is temporarily obstructed, although he also operates a railroad.[3]

Deviation is always excused to succor the distressed, whether on the vessel in question or another.[4]

Consent of the owner excuses deviation, and a notorious and uniform usage with reference to which the contract was made, may be proved to explain an apparent deviation.[5]

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[1] Johnson v. N. Y. Cent. R. Co., *supra;* Maryland Ins. Co. v. Le Roy, 7 Cranch, 26; Sager v. Portsmouth, etc., R. Co., 31 Me. 228; 50 Am. Dec. 659. But see Am. Ex. Co. v. Smith, 33 Ohio St. 511; 31 Am. Rep. 561, as to perishable property.

[2] Riggin v. Patapsco Ins. Co., 7 Har. & J. 279; 16 Am. Dec. 302.

[3] Empire Trans. Co. v. Wallace, 68 Pa. St. 302; 8 Am. Rep. 178.

[4] As where the captain's wife met with a severe accident on board and the vessel put in port for medical assistance for her. Perkins v. Augusta, etc., Co., 10 Gray, 312; 71 Am. Dec. 654. So where the deviation was on account of scarcity of water and provisions on board. Kettell v. Wiggin, 13 Mass. 68. See Walsh v. Homer, 10 Mo. 6; 45 Am. Dec. 342. In the former case the court said: "It makes no difference whether the object of such departure is to alleviate the distress and administer to the necessities of persons who are lawfully on board, or of strangers suffering from disasters sustained by the loss or wreck of another vessel. The dictates of humanity are as forcible in the one case as in the other; and it would be strange and unreasonable if the law recognized any discrimination between them." There must be a real necessity however. "The rule thus qualified neither excludes a consideration of the claims of humanity, nor fails to afford a reasonable degree of protection to the pecuniary interest of parties, who have insured the safety of the ship. But if there is a conflict between the two, the former must, to the extent above stated, be regarded as of paramount importance."

[5] Hendricks v. The Morning Star, 18 La. Ann. 353; Harris v. Rand, 4 N. H. 259; 17 Am. Dec. 421; Robertson v. Nat. S. S. Co., 139 N. Y., 416; Constable v. Nat. St. Co., 154 U .S. 51.

Delay.—If the carrier puts the goods in a warehouse to await the usual train for transportation, he is liable as carrier and not merely as warehouseman.[1]

The carrier is bound to transport the goods with reasonable despatch, and is liable in damages for unnecessary and avoidable delay, whereby the property is lost or injured or its market value is lessened.[2] But such damages must be the proximate result of the delay, and so where the injury occurs after the arrival of the goods at the destination by an act of God, such as an unprecedented flood, he is not liable, although the goods would not have been exposed to the injury but for the delay.[3] But it is otherwise if his delay contributes to the injury by act of God in the course of transportation.[4]

Not only is delay in the transportation excused by the act of God, inevitable accident, or the public enemies, but it has been held in recent times, contrary to the ancient doctrine, to be excused by the forcible act of striking or

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[1] Moses v. B. & M. Railroad, 24 N. H. 71; 55 Am. Dec. 222; Ladue v. Griffith, 25 N. Y. 364; 82 Am. Dec. 360.

[2] Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Mann v. Birchard, 40 Vt. 326; 94 Am. Dec. 398, and note, 403; Strohn v. Detroit, etc., R. Co., 23 Wis. 126; Sisson v. Cleveland, etc., R. Co., 14 Mich. 489; 90 Am. Dec. 252; 99 Am. Dec. 114; Canfield v. Balt., etc., R. Co., 93 N. Y. 532; 45 Am. Rep., 268; Ward v. N. Y. Cent. R. Co., 47 N. Y. 29; 7 Am. Rep. 405; Deming v. Grand T. Ry. Co., 48 N. H. 455; 2 Am. Rep. 267; Dunham v. Boston, etc., Ry. Co., 70 Me. 164; 35 Am. Rep. 314; McGraw v. Balt., etc., R. Co., 18 W. Va. 361; 41 Am. Rep. 696; Devereux v. Buckley, 34 Ohio St. 16; 32 Am. Rep. 342; Bradford v. S. C. R. Co., 7 Rich. L. 201; 62 Am. Dec. 411. See note, 11 Am. St. Rep. 360.

[3] Denny v. N. Y. Cent. R. Co., 13 Gray, 481; 74 Am. Dec. 645, Hoadley v. North Trans. Co., 115 Mass. 304; 15 Am. Rep. 106; Jones v. Gilmore, 91 Pa. St., 310; Railroad Co. v. Reeves, 10 Wall. 191; Bansemer v. Toledo, etc., R. Co., 25 Ind. 434.

[4] Read v. Spaulding, 30 N. Y. 630.

discharged employees;[1] but not unless the act was forcible.[2] Delay is also excused by the act of the government, as an embargo.[3] But not because of failure to receive a bill of back charges of a connecting carrier,[4] nor of unwillingness to accede to the demands of a succeeding connecting carrier.[5] It has been held that he is excused by an extraordinary glut of freight,[6] and by a collision without his fault by the negligence of another company having the right of way.[7]

But in all such cases, the carrier is bound to resume and finish the transportation with reasonable diligence as soon as the obstructing cause is removed.[8]

Independent of special agreement, the carrier is not bound to use extraordinary efforts or incur extra expense in forwarding the goods.[9] He may forward the goods in

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[1] Pittsburgh, etc., R. Co. v. Hazen, 84 Ill. 36; 25 Am. Rep. 422 — "The case supposed is not distinguishable in principle from the assault of a mob of strangers." Three judges dissented. See to same effect, Geismer v. Lake Shore, etc., Ry. Co., 102 N. Y. 563; 55 Am. Rep. 837; Pittsburgh, etc., R. Co. v. Hollowell, 65 Ind. 188; 32 Am. Rep. 63; Gulf, etc., Ry. Co. v. Levi, 76 Tex. 337; 18 Am. St. Rep. 45; 8 L. R. A. 323. The wilful act of the carrier's servants is no defense. Weed v. Panama R. Co., 17 N. Y. 362.

[2] Blackstock v. N. Y., etc., R. Co., 20 N. Y. 48; 75 Am. Dec. 372; Lewis & Co. v. Ludwick, 6 Cold. 368; 98 Am. Dec. 454; and so where the delay was caused by a peaceable strike and willful disobedience of other employees. Cent., etc., Co. v. Georgia, etc., Exch. — Ga.

[3] Hadley v. Clark, 8 T. R., 259; Palmer v. Lorillard, 16 Johns. 348.

[4] Michaels v. N. Y. Cent. R. Co., 30 N. Y. 564; 86 Am. Dec. 415.

[5] Condict v. Gd. T. Ry. Co., 54 N. Y. 500.

[6] Taylor v. Gt. N. Ry. Co., 1 L. R., C. P. 385; Cantwell v. Pac. Ex. Co., 58 Ark. 487.

[7] Conger v. H. R. R. Co., 6 Duer, 375; 61 N. Y. 652.

[8] Bowman v. Teall, 23 Wend. 306; 35 Am. Dec. 562; Rathbone v. Neal, 4 La. Am. 563; 50 Am. Dec. 579; Bennett v. Byram & Co., 38 Miss. 17; 75 Am. Dec. 90; Balt. & O. R. Co. v. O'Donnell, 49 Ohio St. 489; 21 L. R. A. 117.

[9] Briddon v. Gt. N. R. Co., 28 L. J. Ex. 51; Am. Ex. Co. v. Smith, 33 Ohio St. 511; 31 Am. Rep. 561.

the order of their receipt,[1] but with a preference of perishable goods.[2]

If perishable freight is delayed by an unprecedented flood, a mere failure to notify the consignee of the delay thereof, does not render the carrier liable for injury.[3]

If extraordinary promptness in delivery is required the shipper should notify the carrier. So an express company is not liable for a day's delay in transmitting a draft delivered to it for carriage, marked as "papers" and without anything to indicate the necessity for promptness,— especially where it would have been paid by the drawee except for a further delay after delivery by it.[4]

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[1] Acheson v. N. Y., etc., 61 N. Y. 652; Empire Trans. Co. v. Wallace, 68 Pa. St. 302; 8 Am. Rep. 178.

[2] Marshall v. N. Y. Cent. R. Co., 45 Barb. 502; 48 N. Y. 660; Peet v. Chicago, etc., Ry. Co., 20 Wis. 594; 91 Am. Dec. 446.

[3] Norris v. Savannah, etc., Ry. Co, 23 Fla. 182; 11 Am. St. Rep. 355.

[4] Bank of Water Valley v. So. Ex. Co. (Mississippi), 16 So. Rep. 300.

CHAPTER XIV.

CARRIERS OF GOODS—DELIVERY.

It is the duty of the carrier ordinarily to carry the goods to their destination, and there deliver them personally to the true owner according to the instructions, or in case personal delivery is impracticable, to deliver them at the carrier's usual place and afford the consignee a reasonable time and opportunity to take them.

Place of delivery.—Carriers by coach or wagon and express companies are ordinarily bound to deliver at the consignee's residence or place of business,[1] but carriers by water are only bound to deliver at their customary docks, and railroads at their stations.[2] It is said that delivery must be personal unless some usage or agreement is shown to the contrary.[3] But in the case of carriers by water or rail, the custom to deliver only at wharf or station is universal and well recognized, and is as effectual as a personal delivery. But delivery must be made at the usual place, and an attempt to deliver at a new, unusual or ill-suited place, resulting in loss, will render the carrier responsible.[4] Even if the destination is a mere flag-station, without agent, depot or warehouse, if this is known to

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[1] Bansemer v. Toledo, etc., Ry. Co., 25 Ind. 434; 87 Am. Dec. 367; Am. Ex. Co. v. Hockett, 30 Ind. 250; 95 Am. Dec. 691; Baldwin v. Am. Ex. Co., 23 Ill. 197; 74 Am. Dec. 190.

[2] Cases note 1, *supra;* Zinn v. N. J. S. Co., 49 N.Y. 442; 10 Am. Rep. 402; Kohn v. Packard, 3 La. 224; 23 Am. Dec. 453; Norway Plains Co. v. B. & M. Railroad, 1 Gray, 262; 61 Am. Dec. 423. Note, 8 Am. Dec. 211.

[3] Gibson v. Culver, 17 Wend. 305; 31 Am. Dec. 297; Fisk v. Newton, 1 Denio, 45; 43 Am. Dec. 649.

[4] Benbow v. N. C. R. Co., Phillips L. 421; 98 Am. Dec. 76; Howard v. S. Co., 83 N. C. 158; 35 Am. Rep. 571.

the consignee, delivery may be there made in the car on a side-track.[1] The delivery must be actual and not merely formal.[2]

Notice to consignee.—All the authorities agree that the carrier is not absolved from all responsibility upon the arrival of the goods at his wharf or station, but they differ as to the nature and extent of that responsibility. It is universally held that the liability of warehouseman remains. As to carriers by water it is held that they must notify the consignee of the arrival, and that the liability of a carrier still rests on them until such notice and a reasonable time thereafter for the consignee to take away the goods.[3] Other cases hold that notice is not necessary, and that allowing the reasonable time is all that is essential.[4] There is the same conflict as to carriers by land. The subject is treated very fully and ably in a Michigan case, in which the court stood equally divided on the proposition that carriers are bound to notify the consignee and give him reasonable time to take away the goods before the liability diminishes to that of warehouseman.[5] In some other courts the necessity of notice is dispensed with.[6]

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[1] South, etc., R. Co. v. Wood, 66 Ala. 167; 41 Am. Rep. 749; Turner v. Huff, 46 Ark. 222; 55 Am. Rep. 580.

[2] Am. Ex. Co. v. Haggard, 37 Ill. 465; 87 Am. Dec. 257; McAndrews v. Whitlock, 52 N. Y. 40; 11 Am. Rep. 657.

[3] Shenk v. Pa., etc., Co., 60 Pa. St. 109; 100 Am. Dec. 541; Kohn v. Packard, 3 La. 224; 23 Am. Dec. 453; Hill M. Co. v. B. & L. R. Co., 104 Mass. 122; 6 Am. Rep. 202; McAndrews v. Whitlock, 52 N. Y. 40; 11 Am. Rep. 657; Redmond v. Liverpool, etc., S Co., 46 N. Y. 578; 7 Am. Rep. 390; Hermann v. Goodrich, 21 Wis. 543; 94 Am. Dec. 562.

[4] Graves v. Hartford, etc., S. Co., 38 Conn. 143; 9 Am. Rep. 369. But this line of cases presupposes the unloading of the cars. If the goods are destroyed by fire while in the cars, the carrier is liable. Porter v. Chic., etc., R. Co., 20 Ill. 407; 71 Am. Dec. 286.

[5] McMillan v. Mich., etc., R. Co., 16 Mich. 79; 93 Am. Dec. 208.

[6] Gashweiler v. Wabash, etc., R. Co., 83 Mo. 112; 53 Am. Rep. 558; Blumenthal v. Brainerd, 38 Vt. 402; 91 Am. Dec. 350; Merch. D. & T. Co. v.

Special directions.—Any special directions, as to delivery

Moore, 88 Ill. 136; 30 Am. Rep. 541; Mobile, etc., R. Co. v. Prewitt, 46 Ala. 63; 7 Am. Rep. 586. In the former case the court admitted that "it has been a vexed question," but claim that "the weight of authority is, that on the arrival of the goods at their destination, after they have been discharged from the cars, the liabilty of a railroad company as a common carrier ceases, and it becomes a bailee for hire." Citing Norway Plains Co. v. R. Co., 1 Gray, 262; Rothschild v. R. Co., 69 Ill. 164; McCarty v. R. Co., 30 Pa. St. 247; Mohr v. R. Co., 40 Iowa, 580; R. Co. v. Kidd, 35 Ala. 209; Jackson v. R. Co., 23 Cal. 268. "The contrary has been held by the courts of last resort of New Hampshire, Wisconsin, Kentucky, New Jersey, Louisiana, Ohio and Kansas." In a note, 7 Am. Rep. 591, it is said:

"One class of cases confines the period of responsibility as carrier, after the arrival of the vehicle, to the narrowest limits, and holds that a removal of the goods from the vessel or the car on to the wharf or platform, or into a freight-house, discharges the carrier of all responsibility as such, and transforms the liability into that of warehouseman. Norway Plains Co. v. Boston & Maine R. Co., 1 Gray, 263; 61 Am. Dec. 423; Sessions v. Western R. Co., 16 id. 132; Rice v. Boston & Worcester R. Co., 98 Mass. 212; Shepherd v. Bristol & Exeter Railroad, L. R., 3 Exch. 189. These cases are decided solely with reference to the carrier's convenience, and while reducing the time after arrival to a minimum, and the specific acts of the carrier to the least possible, before the liability as carrier ceases, they do not take into account the convenience or reasonable expectations of the consignee. That able jurist, Chief Justice Shaw, of the supreme court of Massachusetts, in Norway Plains Co. v. Railroad Co., *supra*, thus presented this view of the subject: 'This view of the law, applicable to railroad companies as common carriers of merchandise, affords a plain, precise, and practical rule of duty, of easy application, well adapted to the security of all persons interested; it determines that they are responsible, as common carriers, until the goods are removed from the cars and placed upon the platform; that if on account of their arrival in the night, or at any other time, when by the usage and course of business, the doors of the merchandise depot or warehouse are closed, or for any other cause they cannot be delivered, or if for any reason the consignee is not there ready to receive them, it is the duty of the company to store them and preserve them safely, under the charge of competent and careful servants, ready to be delivered, and actually deliver them when duly called for by parties authorized and entitled to receive them; and for the performance of these duties, after the goods are delivered from the cars, the company are liable as warehousemen or keepers of goods for hire.'

must be complied with by the carrier. So a carrier, accept-

"There is another class of cases which deem the liability of the carrier, as such, to continue until the consignee has notice and reasonable time for removal, whether the goods remain in the vehicle of transportation or have been stored in a warehouse. Moses v. Boston & Maine R. Co., 32 N. H. 523; 64 Am. Dec. 381; Shenk v. Philadelphia Steam Propeller, 60 Pa. St. 109; 100 Am. Dec. 541; Redmond v. Liverpool, New York & Philadelphia Steamboat Co., 46 N. Y. 578; 7 Am. Rep. 390; Blumenthal v. Brainard, 38 Vt., 402; 91 Am. Dec. 350; Winslow v. Vermont & Massachusetts R. Co., 42 id. 700; 1 Am. Rep. 365; Hill Manufacturing Co. v. R. Co., 104 Mass. 122; 6 Am. Rep. 202; Graves v. Hartford & New York Steamboat Co., 38 Conn. 143; 9 Am. Rep. 369. This flexible rule seems to be that most generally adopted in this country, according to the later cases. If the liability of the carrier continues at all after the arrival of the vehicle containing the transported goods, it must continue for a reasonable time after such arrival. None of these cases go so far as to hold that at the moment the vessel or car arrives at its destination the liability as carrier ceases. Goods must be at least be taken out of the vessel or car, or delivery must be accepted by the consignee while on board such vessel or car, in order to terminate the liability as carrier, according to the strictest of cases. and it seems a most arbitrary rule that a removal of the goods from the vehicle of transportation to a platform, wharf, or warehouse should, *per se*, be sufficient to terminate the responsibility as carrier.

"A distinction has been suggested between land-borne and water-borne goods, but this seems to be not well founded, and was repudiated in Graves v. Steamboat Co., *supra*, and in Redmond v. Steamboat Co., *supra*. See also Richardson v. Goddard, 23 Howard (U. S.), 28. The effect of custom has however been recognized. In McMaster v. Pennsylvania R. Co., 69 Pa. St. 374; 8 Am. Rep. 264, it was held that upon proof of a custom on the part of a railroad company to deliver goods at a way station on their platform, without warehousing or giving notice of their arrival to the consignee, such delivery was sufficient, and an exoneration of the carrier from liability for their subsequent loss. See also Farmers & Mechanics' Bank v. Champlain Transportation Co., 23 Vt. 186; 56 Am. Dec. 68."

In Mo. Pac. Ry. Co. v. Nevils, 30 S. W. Rep. 425; 28 L. R. A. 80, the Supreme Court of Arkansas hold that the liability of railroads as common carriers does not cease on removal of the goods from the cars, but only after the consignee has had a reasonable time, after notice of their arrival, to remove them. The court say: "Two well-defined but widely divergent rules have been announced by the American courts upon the proposition embodied in the

ing goods marked for delivery at a private landing, may

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first of the above instructions. In 1854 the Supreme Court of Massachusetts determined that the liability of railroads as common carriers ceased the moment the goods of the consignee were removed from their cars and placed in a safe place upon their platforms within their depots, and that from that time until the goods were called for and delivered to the consignee the liability of the railroad was only that of warehouseman. Norway Plains Co. v. Boston & M. R. Co., 1 Gray, 263. This rule has been approved in several States,—Illinois, Indiana, Iowa, Georgia, California, Missouri, North Carolina, and Tennessee. In 1856 the Supreme Court of New Hampshire expressly departed from the doctrine of the Massachusetts court, holding that the liability of the carrier as such continued until the owner should have a reasonable time after the arrival of the goods to accept and remove them. Moses v. Railroad Co., 32 N. H. 523. This doctrine has been approved by the Supreme Courts of the following States, to-wit: Alabama, Louisiana, Kentucky, New Jersey, Kansas, Ohio, Vermont, Wisconsin, New York, Michigan, Minnesota, Texas, Connecticut, and Pennsylvania. Counsel for appellant cite Alabama and Pennsylvania as supporting the Massachusetts rule, but an examination of the cases of Railroad Co. v. McGuire, 79 Ala. 395, and Railroad Co. v. Oden, 80 Ala. 39, and the case of Steamship Co. v. Smart, 107 Pa. St. 492, will discover that Alabama and Pennsylvania are in line with the New Hampshire rule as to the consignee having a reasonable time in which to remove the goods, during which time the liability of the carrier as an insurer continues. Counsel for appellee are likewise mistaken in putting Tennessee in the New Hampshire column. See Butler v. Railroad Co., 8 Lea, 32. But whatever rule we adopt, we will be but going upon a well-beaten path, and following in the footsteps of eminent jurists. It is difficult to determine where lies the weight of authority amid such respectable conflict. But considering the 'broad principles of public policy and convenience upon which the common-law liability of the carrier is made to rest,' the doctrine of the New Hampshire court commends itself to our favor. We think it embodies the better reason. Without entering upon a discussion of these principles (for we could not hope to add anything new) we simply announce our approval of the New Hampshire case as applicable to the undisputed facts of this case. This doctrine is supported, we believe, by a majority of the text writers, as well as the adjudicated cases. In addition to authorities cited in brief of counsel, see 2 Beach Ry. Law, § 916; 3 Wood Railroads, 1908; 2 Redf. Railroads, 81; Story Bailm. § 543; and Hutch. Carr. § 373. The Supreme Court of New York in Fenner v. Railroad Co., 44 N. Y 505, has covered the whole doctrine of notice and reasonable opportunity to remove the goods after

not deliver them at another landing.[1] So in respect to goods consigned "C. O. D.";[2] but in this case the carrier may afford the consignee a reasonable opportunity to examine the goods.[3]

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arrival at place of destination, as follows: 'If the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight house, and after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases.' As to what is reasonable time for removal, where the facts are undisputed, as in this case, is a question of law. Where there is a dispute about the facts, the question must be determined by the jury or court sitting as such. It should be said, however, that the question of reasonable time and opportunity to remove the goods is not in the least affected by any untoward or adventitious surroundings peculiar to any particular consignee. Hutch. Carr. 377."

See also, Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co., Kans.; 40 Pac. Rep., 899; R. Co. v. Maris, 16 Kans. 333; Scheu v. Benedict, 116 N. Y. 510; North Penn. Ry. Co. v. Com. Nat. Bank of Chicago, 123 U. S. 727.

The view that favors the consignee is adopted in Tarbell v. Royal, etc., Co., 110 N. Y. 170; 6 Am. St. Rep. 350; Adams Ex. Co. v. Darnell, 31 Ind. 20; 99 Am. Dec. 582. The view favorable to the carrier is found in Francis v. Dubuque, etc., R. Co., 25 Iowa, 60; 95 Am. Dec. 769, where it is said: "To say that the responsibility of the carrier continues for one hour after the goods are stored is on principle no more reasonable than to say that it shall continue for six, twelve, or twenty-four!" This case gives a useful list of the authorities on both sides.

[1] Stricker v. Leathers, 68 Miss. 803; 13 L. R. A. 600; Mich., etc., R. Co. v. Day, 20 Ill. 375; 71 Am. Dec. 278; Strahorn v. Union, etc., Co., 43 Ill. 424; 92 Am. Dec. 142.

[2] Daylight Burner Co. v. Odlin, 51 N. H. 56; 12 Am. Rep. 45; Murray v. Warner, 55 N. H. 546; 20 Am. Rep. 227; Norfolk S. R. Co. v. Barnes, 104 N. C. 25; 5 L. R. A. 611

[3] Lyons & Co. v. Hill & Co., 46 N. H. 49; 88 Am. Dec. 189. So where the direction is to deliver on presentation of a duplicate bill of lading. McEwen v. Jeffersonville R. Co., 33 Ind. 368; 5 Am. Rep. 216; Weyand v. Atchison, etc., R. Co., 75 Iowa, 573; 9 Am. St. Rep. 504; 1 L. R. A. 650.

Carrier's refusal to deliver.—If the carrier refuses or neglects to deliver the goods on demand, either for his own convenience or through carelessness, his liability as carrier is not discharged.[1]

Consignee's refusal to accept.— If the consignee refuses to receive the goods after tender, or notice, and a reasonable time and opportunity to take them, the carrier's liability is not discharged, but is reduced to that of warehouseman, if he still retains the goods, and he is responsible only for ordinary care.[2]

What is a reasonable time and opportunity for the consignee to take the goods depends much on their character as to bulk, number, value, perishability, and the like. The duty to deliver and the duty to receive are reciprocal. For example, the consignee of specie or other money cannot prolong the carrier's liability as insurer by refusal to take it although tendered out of banking hours.[3] But otherwise if the goods are tendered after the consignee's store is closed and his employees have gone away.[4] If the carrier retains the goods for the accommodation of the

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[1] Meyer v. Chic., etc., Ry. Co., 24 Wis. 566; 1 Am. Rep. 207; Faulkner v. Hart, 82 N. Y. 413; 37 Am. Rep. 574. But in East Tenn., etc., R. Co. v. Kelly, 91 Tenn. 699; 17 L. R. A. 691, it is held that the liability is only as warehouseman.

[2] Ostrander v. Brown, 15 Johns. 39; 8 Am. Dec. 211; Young v. Smith, 3 Dana, 91; 28 Am. Dec. 57; Marshall v. Am. Ex. Co., 7 Wis. 1; 73 Am. Dec. 381; Steamboat Keystone v. Moies, 28 Mo. 243; 75 Am. Dec. 123; Wood v. Crocker, 18 Wis. 345; 86 Am. Dec. 773; Rankin v. Memphis, etc., Co., 9 Heisk. 564; 24 Am. Rep. 339; Smith v. Nashua, etc., R. Co., 27 N. H. 86; 59 Am. Dec. 364; Union Pac. Ry. Co. v. Moyer, 40 Kans. 184; 10 Am. St. Rep. 183; Missouri, etc., Ry. Co. v. Haynes, 72 Tex. 175.

[3] Marshall v. Am. Ex. Co., *supra;* Young v. Smith, *supra;* Adams Ex. Co. v. Darnell, 31 Ind. 20; 99 Am. Dec. 582. See Rice v. Hart, 118 Mass. 201; 19 Am. Rep. 433; Eagle v. White, 6 Whart. 505; 37 Am. Dec. 434; Scheu v. Benedict, 116 N. Y. 510; 15 Am. St. Rep. 426.

[4] Hill v. Humphreys, 5 W. & S. 123; 39 Am. Dec. 117.

consignee and at his request, without additional consideration, he is thereafter liable only as a gratuitous bailee.[1]

If the consignee does not take the goods within a reasonable time after notice or reasonable effort to notify, the carrier may divest himself of all responsibility by storing them with a responsible third person, engaged in that business at that place, for the owner's account.[2] Notice of delivery or discharge is dispensed with where the consignee is absent or cannot be found after reasonable effort,[3] but not by a custom of delivering to public draymen.[4] Notice may also be dispensed with by particular provision as to delivery in the bill of lading.[5]

Connecting carriers.— When the contract of the carrier is only to deliver to another carrier, his liability as carrier subsists until actual delivery to the next carrier, and is not modified by warehousing while awaiting such delivery.[6]

Demurrage.—In the case of transportation of goods by water, it is usual for the bill of lading to provide that in case of delay on the part of the consignee in accepting or receiving the goods beyond a stipulated time, the carrier shall be entitled to recover from him a certain stipulated

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[1] Knowles v. Atlantic, etc., R. Co., 38 Me. 55; 61 Am. Dec. 234.

[2] Fisk v. Newton, 1 Denio, 45; 43 Am. Dec. 649; Kohn v. Packard, 3 La. 224; 23 Am. Dec. 453.

[3] Witbeck v. Holland, 45 N. Y. 17.

[4] Dean v. Vaccaro, 2 Head. 488; 75 Am. Dec. 744.

[5] As when it is provided that the goods shall be taken from alongside the vessel as soon as it is ready to discharge. Constable v. Nat. S. Co., 154 U. S. 51.

[6] Bancroft v. Merch. D. F. Co., 47 Ia. 262; 29 Am. Rep. 482, and cases cited; Railroad Co. v. Manuf. Co., 16 Wall. 318; Rawson v. Holland, 59 N. Y. 611; 17 Am. Rep. 394; Lawrence v. Winona, etc., R. Co., 15 Minn. 390; 2 Am. Rep. 130; Illinois Cent. R. Co. v. Mitchell, 68 Ill. 471; 18 Am. Rep. 564; Hooper v. Chic., etc., Ry. Co., 27 Wis. 81; 9 Am. Rep. 439; Condon v. Marquette, etc., R. Co., 55 Mich. 218; 54 Am. Rep. 367; Vannatta v. Cent. R. Co., 154 Pa. St. 262; 35 Am. St. Rep. 823.

amount; which is called Demurrage. It has been held in some of the State courts, that demurrage is not recoverable from the consignee unless the bill of lading stipulates for its payment.[1] But in the Federal courts it is held to be recoverable whether so stipulated or not.[2]

Custom.— Proof of usage is competent to justify stage-coach proprietors in leaving goods at their office to be called for, and to warrant carriers by water in delivering goods to a wharfinger, or a railroad company in delivering on a platform at a station where there was no warehouse,[3] or carriers by water in delivering at a certain landing although there is no warehouse there, and so of an usage that the consignee shall furnish skidds for unloading.[4]

But otherwise of usage to deliver goods to a cartman usually employed by the consignee, or to a public drayman, or merely to publish notice in a newspaper, or to demand a receipt, or for a carrier by water to transport inland from the port of delivery, or contrary to the bill of lading although according to usage with the consignee, or to a person holding an unindorsed bill of lading.[4]

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[1] Gage v. Morse, 12 Allen, 410; Miner v. N. & W. R. Co., 32 Conn. 91.

[2] Sprague v. West, Abb. Adm. 548; Railroad Co. v. Northam, 2 Ben. 1; The Pietro G., 38 Fed. Rep. 138; The Hyperion's Cargo, 2 Lowell, 93. For the development of the doctrine of demurrage consult Porter on Bills of Lading, Abbott on Shipping, and cases in 8 Eng. Rul. Cas., with American notes by the present writer.

[3] Gibson v. Culver & Brown, 17 Wend. 305; 31 Am. Dec. 297; Farmers', etc., Bk. v. Champlain T. Co., 16 Vt. 52; 42 Am. Dec. 491; McMasters v. Penn. R. Co. 69 Pa. St. 374; 8 Am. Rep. 264; Turner v. Huff, 46 Ark. 222; 55 Am. Rep. 580; Loveland v. Burke, 120 Mass. 139; 21 Am. Rep. 507. In Constable v. National St. Co., 154 U. S. 51, goods arriving by steamship at New York, and the company's wharf being so blocked that the ship could not land, her cargo was delivered at another wharf, according to custom in such cases, and notice thereof was posted at the company's wharf, but the consignee was not notified. Held, a good delivery by custom. (Three justices dissenting.)

[4] Ostrander v. Brown, *supra;* Dean v. Vaccero, *supra;* Kohn v. Packard,

The carrier is bound to comply with a custom to notify the customs' collector and the consignee of the arrival of bonded goods.[1]

Waiver.—Delivery at the destination, or the ordinary mode of delivery there, may be waived by the consignee, as by his assuming control,[2] or by his accepting them at a point short of the destination.[3]

Legal process.—The carrier may justify yielding up the goods to valid legal process,[4] but not where there is no process, or it is invalid although he supposed it valid.[5] He may also yield to paramount title.[6]

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supra; Morgan v. Dibble, 29 Tex. 107; 94 Am. Dec. 264; Reed v. Richardson, 98 Mass. 216; 93 Am. Dec. 155; Penn. R. Co. v. Stern, 119 Pa. St. 24; 4 Am. St. Rep. 626; Weyand v. Atchison, etc., R. Co., 75 Iowa, 573; 9 Am. St. Rep. 504.

[1] Chicago, etc., Ry. Co. v. Sawyer, 69 Ill. 285; 18 Am. Rep. 613.

[2] Stone v. Waitt, 31 Me. 409; 52 Am. Dec. 621; Goodwin v. Balt., etc., R. Co., 50 N. Y. 154; 10 Am. Rep. 457.

[3] Lorent v. Kentring, 1 N. & McC. 132; Hunt v. Haskell, 24 Me. 339; 41 Am. Dec. 387.

[4] Pingree v. Detroit, etc., R. Co, 66 Mich. 143; 11 Am. St. Rep. 479.

[5] National Bk. v. Chic., etc., R Co., 44 Minn. 224; 9 L. R. A. 263; 20 Am. St. Rep. 566.

[6] Bliven v. Hudson R. R. Co., 36 N. Y. 403; Edwards v. White Line Trans. Co., 104 Mass. 159; 6 Am. Rep. 213; Kiff v. Old C., etc., Ry. Co., 117 Mass. 591; 19 Am. Rep. 429; Gibbons v. Farwell, 63 Mich. 344; 6 Am. St. Rep. 301; Bennett v. Am. Ex. Co., 83 Me. 236; 13 L. R. A. 33; 23 Am. St. Rep. 774; *contra*, if he notifies the consignee; Jewett v. Olsen, 18 Oreg. 419; 17 Am. St. Rep. 745; Ohio, etc., R. Co. v. Yohe, 51 Ind. 181; 19 Am. Rep. 727. In Edwards v. White Line T. Co., *supra*, the court say of the attachment: "As against the plaintiffs it was of no more validity than a trespass by any other unauthorized proceeding, or by an unofficial person. The carrier is not relieved from the fulfillment of his contract, or his liability as carrier, by the intervention of such an act of dispossession, any more than he is by destruction from fire, or loss by theft, robbery or unavoidable accident. In neither case is he liable in trover for conversion of the property, but he is liable on his contract, or upon his obligations as common carrier. The owner may, it is true, maintain trover against the officer who took the property from the carrier; but

Delivery to true owner.—The carrier may safely deliver

he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him." In Gibbons v. Farwell, *supra*, the court consider that the surrender to an officer without a legal warrant was a conversion. But in Ohio & Miss. Ry. Co. v. Yohe, *supra*, the court said: "It is impossible for the carrier to deliver the goods to the consignee, when they have been seized by legal process and taken out of his possession. The carrier cannot stop, when goods are offered to him for carriage, to investigate the question as to their ownership. Nor do we think he is bound, when the goods are so taken out of his possession to follow them up, and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of the process may be. In every case the carrier must yield to the authority of legal process. After the seizure of the goods by the officer by virtue of the process, they are in the custody of the law, and the carrier cannot comply with his contract without a resistance of the process and a violation of the law. The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process, or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their remedy against the officer who seized them, or against the party at whose instance it was done. As between these parties, the process would be no justification, if the plaintiffs were the owners and entitled to the possession of the goods." Citing Stiles v. Davis, 1 Black. 101. In Pingree v. Detroit, etc., R. Co., 66 Mich. 143; 11 Am. St. Rep. 479, the court said: "There seems to be a little apparent conflict between the cases on this question, but there can be not doubt where the rule of justice lies. * * * There is no sense or justice in enabling a consignor to compel a carrier, at his peril, to defend a title that he knows nothing about, and has no means of defending, unless the consignor gives it to him. * * * If the carrier cannot call on the consignor to defend, and must take the risk and the loss, he runs the risk of an action; and if a wrongful holder, by doubtful title, or even by theft, compels him to receive the consignment, he can get the value from the carrier who has had them seized by the true owner, unless the carrier has means of proof, that he never can be presumed to have, of the lack of intent in the shipper. Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to presume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what

to the true owner, although not the consignee,[1] but he is not bound to do so unless the demand is accompanied by legal process.[2] Some cases however hold that the carrier is bound to decide as to the true ownership, at his peril, and that his refusal to surrender to the true owner is a conversion.[3]

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he may yield to usurped authority." Citing Stiles v. Davis, *supra*. One judge dissented.

[1] Wells v. Am. Ex. Co., 55 Wis. 23; 42 Am. Rep. 695; Transportation Co. v. Barber, 56 N. Y. 544; Harker v. Dement, 9 Gill, 7; Hardman v. Willcock, 9 Bing., 382; Cheesman v. Exall, 6 Exch., 341; Express Co. v. Greenhalgh, 80 Ill. 68; Wolfe v. Railway Co., 97 Mo. 473; The Idaho, 93 U. S. 575.

[2] Kohn v. Richmond, etc., R. Co., 37 S. C. 1 · 34 Am. St. Rep. 726, and note, 731; 24 L. R. A. 100.

[3] Shellenberg v. Fremont, etc., R. Co., Neb. Sup. Ct.; 63 N. W. Rep. 859. The court said: "The single question presented is whether the defendant, as a common carrier of property, was bound at its peril to determine which of the rival claimants of the property was the rightful owner. It was formerly held that, where a bailee of goods delivered them to the rightful owner, he would, notwithstanding that fact, be answerable to the bailor without title thereto. The reason for the rule was that a bailee, having recognized the bailor as the owner, should not be permitted to dispute the latter's title. But according to the modern rule, as recognized in this country and in England, it is a sufficient excuse for the non-delivery of personal property for the bailee to show that he has surrendered it to the rightful owner. Hutch. Carr. 404; Transportation Co. v. Barber, 56 N. Y. 544; Harker v. Dement, 9 Gill, 7; Hardman v. Willcock, 9 Bing. 382; Cheesman v. Exall, 6 Exch. 341; Wells v. Express Co., 55 Wis. 23; 11 N. W. Rep. 537; and 12 N. W. Rep. 441; Express Co. v. Greenhalgh, 80 Ill. 68; Wolfe v. Railway Co., 97 Mo. 473, 11 S. W. Rep. 49. The Idaho, 93 U. S. 575. The reasoning upon which the modern doctrine rests is that the obligation of the bailee is to restore the property or to account for it, and that he has in legal contemplation accounted for it when he has delivered it to one whose title and right of possession is paramount to that of his bailor." "On the question of the duty of a common carrier or other bailee at its peril to determine between the bailor and a third party claiming title, the authorities are less numerous than the importance of the subject would seem to suggest, although the pronounced weight thereof sustains the proposition that a refusal to surrender to the rightful owner amounts to a conversion, for which the latter may recover, if entitled to possession at the time of his

Misdelivery.—The carrier is otherwise bound, at his peril, to deliver to the consignee addressed, or his authorized

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demand. In Wells v. Express Co., 55 Wis. 23, a well considered case, Judge Orton, after asserting the liability of the carrier, says: 'This principle obtains in all cases of bailment, and the *jus tertii* may be enforced, even as against the contract of bailment, and when enforced will be made available to excuse and protect the bailee from the performance of delivery according to its terms, and it is founded on reason, as well as sustained by a great preponderance of authority. There can be no distinction between its application in case the bailor or consignor seeks to reclaim the property from the bailee or carrier, and in case the consignee seeks its delivery, for the rights of all the parties to the contract must yield to the paramount right of the real owner of the property.' It is also said, in the same opinion: 'When the liability of the express company to respond to the claim of a third person as the exclusive owner of the property against the terms or directions of the consignment for delivery to another, or for delivery to himself and another, is established by law, as now seems clear, it follows that such third person should recover in an action against the company upon proof of ownership.' The proposition there asserted finds support in the following authorities: Transportation Co. v. Barber (*supra*); The Idaho (*supra*); Hutch. Carr. (406, 407). We have been referred to a single case at variance with the above doctrine, viz, Kohn v. Railroad Co., 37 S. C. 1, in which, with one Judge dissenting, the liability of the defendant was denied. The reasons upon which that case rests are shown by the following quotation: 'It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have some means of meeting it, and not by the carrier, who cannot be supposed to know anything about the real ownership of the goods, and has a right to assume that the person from whom he received possession of the goods was such rightful owner, possession of personal property being evidence of title.' There is no doubt that the assertion of conflicting claims has been the occasion of frequent embarrassment to bailees, particularly common carriers, who are bound to receive goods offered for transportation, although there has been suggested no sufficient reason for excepting them from the operation of the rule by which the rightful owner is permitted to reclaim property whenever found. We are aware of exceptions to the rule, but they rest upon equitable considerations, none of which are presented by the record in this case, and need not therefore be noticed. But whatever may have been the embarrassment and inconvenience of the bailee under the former practice, his remedy under our system, by an answer in the nature of a bill of interpleader, thus making the adverse claimant a party to

agent, and is liable for delivery to anyone else, whether intentionally, or by mistake, or through imposition.[1] Where goods have been fraudulently ordered in the name of a fictitious person and shipped direct to such person, it has been held that delivery to a stranger without evidence of his identity renders the carrier liable,[2] but this is disputed in cases where there was no negligence, and delivery was made to the shipper answering the name.[3] Delivery to an unauthorized carman is at the carrier's risk.[4] So where delivery was to be made to the shipper himself, unauthorized delivery to a purchaser from him is invalid.[5] If A. delivers property to a carrier for carriage and delivery to B., and by subsequent direction of A. the carrier delivers it to another person, he is liable to an action by B.[6]

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the controversy, and requiring such claimants to litigate the question of title between themselves, is ample and complete."

[1] Shenk v. Phila. S. P. Co., 60 Pa. St. 109; 100 Am. Dec. 541; Vincent v. Rather, 31 Tex 77; 98 Am. Dec. 516; Hayes v. Wells, etc., 23 Cal. 185; 83 Am. Dec. 89; McEntee v. N. J. S. Co., 45 N. Y. 34; 6 Am. Rep. 28; Houston, etc., Ry. Co. v. Adams, 49 Tex. 748; 30 Am. Rep. 116; Howard v. Steamship Co., 83 N. C. 158; 35 Am. Rep. 571.

[2] Price v. Oswego, etc., Ry. Co., 50 N. Y. 213; 10 Am. Rep. 475 (Church, C. J., dissenting); Winslow v. Vt., etc., R. Co., 42 Vt. 700; 1 Am. Rep. 365; So. Ex. Co. v. Van Meter, 17 Fla. 783; 35 Am. Rep. 107.

[3] Dunbar v. Boston, etc., R. Corp., 110 Mass. 26; 14 Am. Rep. 576; Samuel v. Cheney, 135 Mass. 278; 46 Am. Rep. 467, distinguishing Price v. Oswego, etc., Ry. Co., and Winslow v. Vt., etc., R Co., *supra*. An express company is not liable for misdelivery of money transmitted by it, where it was sent by the consignor in answer to a telegram purporting to be from a person in whom he had confidence, without inquiry as to whether the sender of the despatch was in fact such person, and delivery was made to the actual sender of the despatch upon reasonable proof as to his identity, although he was not in fact the person whom the consignor supposed him to be. Pacific Express Co. v. Shearer (Ill.); — L. R. A. —.

[4] Guillaume v. Hamburgh, etc., Co., 42 N. Y. 212; 1 Am. Rep. 512.

[5] Wolfe v. Pac. R. Co., 97 Mo. 473; 3 L. R. A. 539; 10 Am. St. Rep. 331.

[6] Bailey v. H. R. R. Co., 49 N. Y. 70.

CHAPTER XV.

CARRIERS OF GOODS — LIEN FOR FREIGHT.

A common carrier has a right to his reasonable charges for the carriage of goods, and may retain them until it is paid.[1]

The lien cannot be acquired unless the goods were delivered for carriage with the consent of the owner, although the carrier was innocent.[2] So where goods are carried merely for the convenience and at the request of a bailee of them.[3] So where the carrier receives goods from another connecting carrier with knowledge that the owner had directed them to be sent by another route.[4] Where goods are mis-sent by the owner's agent, the carrier still has his lien.[5]

The lien attaches when the carrier's liability as such begins, "as soon as he receives the goods on a contract of carriage. The contract being, as we have seen, entire, the shipper or customer delivering the goods can only take them back on paying the freight."[6]

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[1] Ames v. Palmer, 42 Me. 197; 66 Am. Dec. 271; Galena, etc., R. Co. v. Rae, 18 Ill. 488; 68 Am. Dec. 574; Redfield on Carr. § 270; Edwards on Bailments, § 645; Skinner v. Upshaw, 2 Ld. Raym. 752; 5 Eng. Rul. Cas. 281.

[2] Robinson v. Baker, 5 Cush. 137; 51 Am. Dec. 54; Fitch v. Newberry, 1 Dougl. 1; 40 Am. Dec. 33; Pingree v. Detroit, etc., R. Co., 66 Mich. 143; 11 Am. St. Rep. 479. The English rule seems to be different, Hutch. on Carr. § 489.

[3] Gilson v. Gwinn, 107 Mass. 126; 9 Am. Rep. 13. See Bassett v. Spofford, 45 N. Y. 387; 6 Am. Rep. 101; Stevens v. B., etc., R. Corp., 8 Gray, 262.

[4] Hill v. Denver, etc., R. Co., 13 Colo. 35; 4 L. R. A. 376. To the contrary is a dictum in King v. Richards, 6 Whart. 418; 37 Am. Dec. 420.

[5] Whitney v. Beckford, 105 Mass. 271.

[6] Edwards on Bailments, § 647, citing Tindal v. Taylor, 4 Ell. & Bl. 219; Keyser v Harbeck, 3 Duer, 373; Hutch. on Carr. § 385, note, citing Thompson

The lien on part delivered to the consignee is valid against the residue,[1] but not where the goods belong to different shippers,[2] or have been sold to different parties.[3]

The lien is valid as against the consignee's right of stoppage in transit.[4]

The lien is valid only for the carriage, and not for another debt,[5] and it does not extend to cartage, after the goods have reached their destination.[6]

The lien is valid for charges paid on the goods to other connecting carriers from whom they were received,[7] but not where the owner did not consent to the carriage by the claimant.[8]

No lien arises on account of the consignee's neglect to take the goods.[9] Nor where it is otherwise provided in

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v. Small, 1 C. B. 328, 354; Bartlett v. Carnley, 6 Duer, 194; Van Buskirk v. Purinton, 2 Hall, 561 "Other cases," he continues, "state the law as being that no right to freight accrues until the voyage has commenced, or as it is usually expressed, until the ship has broken ground." Citing Bailey v. Damon, 3 Gray, 92; Curling v. Long, 1 B. & P. 634; Clemson v. Davidson, 5 Binney, 392; Burgess v. Gun, 3 H. & J. 225. Redfield (Carriers, § 298) takes the latter view. As the carrier's liability as insurer begins on the receipt of the goods for carriage his lien should then attach.

[1] Lane v. Old Col. Railroad, 14 Gray, 143; Frothingham v. Jenkins, 1 Cal. 42; 52 Am. Dec. 286; New Haven & R. Co. v. Campbell, 128 Mass. 104; 35 Am. Rep. 360.

[2] Hale v. Barrett, 26 Ill. 195; 79 Am. Dec. 367.

[3] Edw. on Bailm. § 649.

[4] Potts v. N. Y., etc., R. Co., 131 Mass. 455; 41 Am. Rep. 247; Newhall v. Vargas, 15 Me. 314; 33 Am. Dec. 617; but only as against the particular goods, if there are no arrearages, although the bill of lading provides that they may be held for all arrearages of freight on other goods. Penn. R. Co. v. Am. Oil Works, 126 Pa. St. 485; 12 Am. St. Rep. 885.

[5] Pharr v. Collins, 35 La. Ann. 939.

[6] Richardson v. Rich, 104 Mass. 156; 6 Am. Rep. 210.

[7] Briggs v. Boston, etc., R. Co., 6 Allen, 246; Bissel v. Price, 16 Ill. 408; Bowman v. Hilton, 11 Ohio, 303.

[8] Stevens v. Boston & W. Railroad, 8 Gray, 262.

[9] Crommelin v. N. Y. & H. R. Co., 4 Keyes, 90.

effect by contract; as where a time is fixed for the payment of the freight subsequent or without reference to delivery.[1] Nor against the national government.[2]

If the consignee accepts the goods short of the destination, a lien *pro rata* attaches.[3]

No lien attaches beyond the amount of charges agreed on beforehand, although the goods prove to be of greater value than the carrier supposed.[4]

The lien is lost by surrender of possession, voluntarily or through negligence,[5] even if it is agreed that the lien shall continue.[6] And so where the carrier refuses to deliver on the ground that the goods are not in his possession,[7] or puts his right to hold them on some other ground than lien; as for example, purchase.[8] And so, in the absence of special contract, where the goods are destroyed by fire before the carriage is completed.[9] And so, where by delay the consignee is injured to an amount equal to the freight,[10] but not so if the injury is by inevit-

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[1] Pinney v. Wells, 10 Conn. 104; Chandler v. Belden, 18 Johns. 157; 9 Am. Dec. 193.

[2] Dufolt v. Gorman, 1 Minn. 301.

[3] Lorent v. Kentring, 1 N. & McC. 132; Hunt v. Haskell, 24 Me. 339: 41 Am. Dec. 387.

[4] Baldwin v. Liverpool, etc., S. Co., 74 N. Y. 125; 30 Am. Rep. 277.

[5] Norfolk S. R. Co. v. Barnes, 104 N. C. 25; 5 L. R. A. 611; Hale v. Barrett, 26 Ill. 195; 79 Am. Dec 367; Boggs v. Martin, 13 B. Mon. 239.

[6] McFarland v. Wheeler, 26 Wend. 467.

[7] Adams Ex. Co. v. Harris, 120 Ind. 73; 16 Am. St. Rep. 315; 7 L. R. A. 214.

Everett v. Coffin, 6 Wend. 603; 22 Am. Dec. 551; Everett v. Saltus, 15 Wend. 474.

[8] New York Cent., etc. R. Co. v. Standard Oil Co., 87 N. Y. 486; Barker v. Schooner, 1 Mackey, 24; 47 Am. Rep. 234.

[9] Dyer v. Grand T. Ry. Co., 42 Vt. 441; 1 Am. Rep. 350, Peebles v. Boston, etc., R. Co., 112 Mass. 498; Hill v. Leadbetter, 42 Me. 572; Bartram v. McKee, 1 Watts. 39.

able accident;[1] and if the carrier pays for the loss of or injury to the goods he may deduct his freight.[2]

The lien is not lost where the goods are seized by judicial process.[3] Nor by delivery on fraudulent promise of the consignee to pay the freight.[4]

The lien is not lost by properly warehousing the goods, the consignee refusing them, even in the carrier's own name.[5]

The lien is assignable.[6] But it does not pass with a wrongful sale or pledge of the goods.[7]

The carrier may not sell the goods to enforce his lien; such a sale is a conversion.[8] He must resort to equity.

In many states the carrier is allowed by statute to sell the goods at public auction for his charges, upon public notice. In such cases, he is bound to use reasonable dili-

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[1] Lee v. Salter, Lalor Supp. 163.

[2] Hammond v. McClures, 1 Bay. 101.

[3] Newhall v. Vargas, 15 Me. 314; 33 Am. Dec. 617. See *ante*, p. —.

[4] Bigelow v. Heaton, 6 Hill, 43.

[5] Gregg v. Ill. Cent. R. Co., 147 Ill. 550; 37 Am. St. Rep. 238; West. Trans. Co. v. Barber, 56 N. Y. 544; Bickford v. Met. S. Co., 109 Mass. 151. In West. Trans. Co. v. Barber, *supra*, the court said: "Then the creation of a further lien for the warehouse charges is made necessary by the act of the owner, and it is immaterial to him whether the carrier creates this additional lien in his own favor by depositing them in a warehouse of his own, if he has one, or in behalf of another in whose warehouse he makes the deposit. In the present case the plaintiff did not deposit the oats for the owner, but in its own name, as its property. Such a deposit, if made in consequence of the default of the owner in receiving, would no more discharge the lien than if made in a warehouse of its own. The keeper, as in the case of a deposit for the owner subject to the lien, had possession by authority of the carrier; and his possession is to be deemed that of the carrier, for the purpose of preserving the lien." See Brittan v. Barnaby, 21 How. 529; Alden v. Carver, 13 Iowa, 253; 81 Am. Dec. 430.

[6] Everett v. Coffin, 6 Wend. 603; 22 Am. Dec. 551.

[7] Everett v. Saltus, 15 Wend. 474.

[8] Briggs v. Boston, etc., R. Co., 6 Allen, 246; 83 Am. Dec. 626; Moore's Ex. v. Patterson, 28 Pa. St. 505.

gence to ascertain the character of the packages from the external indications, and to communicate his knowledge to the bidders, and if he fails to do so, and sells valuable goods to a favorite, having superior knowledge, at a nominal price, he and the purchaser are liable to an action of damages by the injured party.[1]

There seems to be no good reason why a private carrier should not have a lien as well as a common carrier, and very authoritative text writers have argued in favor of the right.[2] But one court has held otherwise,[3] no satisfactory reason being assigned.

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[1] Nathan v. Shivers, 71 Ala. 117; 46 Am. Rep. 303.

[2] Hutch. Carr. sec. 46; Jones Liens, sec. 276.

[3] Fuller v. Bradley, 25 Pa. St. 120, by Black, J.

CHAPTER XVI.

CARRIERS OF PASSENGERS — OBLIGATION TO CARRY, AND WHO ARE PASSENGERS.

One who holds himself out as a common carrier of passengers is bound to carry all well-behaved persons applying for passage, so far as he has accommodations for them, upon their paying their fare according to his reasonable regulations. He is bound to carry for the public without discrimination of person, and may not receive nor reject applicants at pleasure.[1]

He is not bound to receive a drunken or disorderly person.[2]

He is bound to carry to all points to which he holds himself out to carry or sells tickets, whether at the end of his route or intermediate.[3]

The relation of carrier and passenger arises whenever a person is received for carriage in any vehicle propelled by the carrier's machinery and forming part of his train, although it may be the property of others and under the immediate charge of their servants; as for example, parlor or drawing-room coaches and sleeping-cars;[4] although those particular proprietors may also be liable to the passenger.[5]

The payment of fare is not always necessary to raise the relation of carrier and passenger. Ordinarily the car-

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[1] Hollister v. Nowlen, 19 Wend. 234; 32 Am. Dec. 455; Cole v. Goodwin, 19 Wend. 251; 32 Am. Dec. 470.

[2] Pittsburgh, etc., Ry. Co. v. Vandyne, 57 Ind. 576; 26 Am. Rep. 68.

[3] Heirn v. McCaughan, 32 Miss. 17; 66 Am. Dec. 588.

[4] Thorpe v. N. Y. Cent., etc., R. Co., 76 N.Y. 402; 32 Am. Rep. 325; Railroad Co. v. Walrath, 38 Ohio St. 461; 43 Am. Rep. 433.

[5] Nevin v. Pullman Pal. C. Co., 106 Ill. 222; 66 Am. Rep. 688; Woodruff S. & P. C. Co. v. Diehl, 84 Ind. 474; 43 Am. Rep. 102.

rier is answerable for his fault resulting in injury to one whom he is carrying gratuitously;[1] but as to a mere trespasser or interloper, the carrier is only bound to use ordinary care and refrain from intentional injury.[2]

The relation is not raised when a person gets upon a train on which the carrier has forbidden passengers to ride, such as a special or a freight train,[3] or on a particular part of a train, such as a baggage car, engine or caboose;[4] but if the regulation is not known to the passenger and he is invited or permitted by the carrier's servants thus to ride, the relation exists.[5]

The following have been held to be passengers: a gratuitous express messenger; a gratuitous government mail agent; a person riding free with his stock; a popcorn peddler, paying for the privilege by the season and supplying passengers with water; one who is willing to pay fare but is not called on for it; one who by mistake takes a wrong train; one who wears the uniform, cap and badge

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[1] Lemon v. Chanslor, 68 Mo. 340; 30 Am. Rep. 799; Brennan v. Fairhaven, etc., R. Co., 45 Conn. 284; 29 Am. Rep. 679.

[2] Higley v. Gilmer, 3 Mont. 90; 35 Am. Rep. 450, and note, 458; Everhart v. Terre Haute, etc., R. Co., 78 Ind. 292; 41 Am. Rep. 567; Chicago, etc., R. Co. v. Mehlsack, 131 Ill. 61; 19 Am. St. Rep. 17; Reary v. Louisville, etc., R. Co., 40 La. Ann. 32; 8 Am. St. Rep. 497.

[3] Houston & Tex. Cent. Ry. Co. v. Moore, 49 Tex. 31; 30 Am. Rep 98; Eaton v. Del., etc., R. Co., 57 N. Y. 382; 15 Am. Rep. 513; Wagner v. Mo. Pac. Ry. Co., 97 Mo. 512; 3 L. R. A. 156.

[4] Creed v. Penn. R. Co., 86 Penn. St. 139; 27 Am. Rep. 693; Bricker v. Phila., etc., R. Co., 132 Pa. St. 1; 19 Am. St. Rep. 585; McVeety v. St. Paul, etc., Ry. Co., 45 Minn. 268; 22 Am. St. Rep. 728; 11 L. R. A. 174; Louisville, etc., R. Co. v. Hailey (Tenn.), 27 L. R. A. 549. If the prohibitory rule is posted conspicously, it is notice to the intruder. Penn. R. Co. v. Langdon, 92 Pa. St. 21; 37 Am. Rep. 651.

[5] Lucas v. Milwaukee, etc., Ry. Co., 33 Wis. 41; 14 Am. Rep. 735; Hanson v. Mansfield, etc., Co., 38 La. Ann. 111; 58 Am. Rep. 162. Some cases hold this, even if the passenger knew the rule but was suffered to ride. Whitehead v. St. Louis, etc., R. Co., 99 Mo. 263; 6 L. R. A. 409.

of another carrier in opposition to the carrier's regulation; one on a construction or hand car by implied permission, as by custom; one unlawfully travelling for pleasure on Sunday.[1]

The following persons have been held not to be passengers: one riding gratuitously in an express car by invitation of the express agent; one riding on a hand-car by invitation of the section foreman; or on a construction-car; a newspaper peddler permitted by the conductor to ride free, against the rules; an infant riding free on a freight train, against the rules and without the knowledge of the conductor, and set by the brakeman at a dangerous service and injured therein; a second person riding with stock, without a ticket, although he intended to pay fare on demand; a boy climbing on a tender at the fireman's request to help supply it with water; one on a construction car under exclusive control of a contractor: an unborn child.[2]

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[1] Blair v. Erie Ry. Co., 66 N. Y. 313; 23 Am. Rep. 55; Brewer v. N. Y., etc., R. Co., 124 N. Y. 59; 11 L. R. A. 483; 21 Am. St. Rep. 647; Hammond v. N. E. R. Co., 6 S. C. 130; 24 Am. Rep. 467; Seybolt v. N. Y., etc., R. Co., 95 N. Y. 562; 47 Am. Rep. 75; Lawson v. Chic., etc., Ry. Co., 64 Wis. 447; 54 Am. Rep. 634; Magoffin v. Mo. Pac. Ry. Co., 102 Mo. 540; 22 Am. St. Rep. 798; Gulf, etc., Ry. Co. v. Wilson, 79 Tex. 371; 23 Am. St. Rep. 345; 11 L. R. A., 486; Missouri P. Ry. Co. v. Ivy, 71 Tex. 409; 10 Am. St. Rep. 758; Cleveland, etc., R. Co. v. Ketcham, 133 Ind. 346; 36 Am. St. Rep. 550; 19 L. R. A. 339; Mellor v. Mo. P. R. Co., 105 Mo. 455; 10 L. R. A. 360; Florida S. R. Co. v. Hirst, 30 Fla. 1; 16 L. R. A. 631; Cincinnati, etc., R. Co. v. Carper, 112 Ind. 26; 2 Am. St. Rep. 144; South. F. R. Co. v. Rhodes, 25 Fla. 40; 3 L. R. A. 733; 23 Am. St. Rep. 506; Rosenbaum v. St. Paul, etc., R. Co. 38 Minn. 173; 8 Am. St. Rep. 653; International, etc., Ry. Co. v. Prince, 77 Tex. 560; 19 Am. St. Rep. 795; Carroll v. Staten Island R. Co., 58 N. Y. 126; 17 Am. Rep. 221; Walker v. Gt. N. R. Co., 28 L. R., Irish, 69.

[2] Union P. Ry. Co. v. Nichols, 8 Kans. 505; 12 Am. Rep. 475; Hoar v. Me. Cent. R. Co., 70 Me. 65; 35 Am. Rep. 299; International, etc., R. Co. v. Cock, 68 Tex. 713; 2 Am. St. Rep. 521; Duff v. Alleghany R. Co., 91 Pa. St. 458; 36 Am. Rep. 675; Sherman v. Hannibal, etc., R. Co., 72 Mo. 62; 37

One lawfully on a train as a passenger continues to be such until his arrival at his destination; he does not forfeit his rights by getting off temporarily at a way station from motives of business or curiosity. So where a passenger by steamboat goes ashore to get a meal.[1]

Am. Rep. 423; Gardner v. N. H., etc., Co., 51 Conn. 143; 50 Am. Rep. 12; Flower v. Penn. R. Co., 69 Pa. St. 210; 37 Am. Rep. 251; Miller v. Minnesota, etc., Ry. Co., 76 Ia. 655; 14 Am. St. Rep. 258.

[1] Parsons v. N. Y. Cent., etc. Co., 113 N. Y., 355; 10 Am. St. Rep. 450; 3 L. R. A. 683; Dodge v. Boston & B. S. S. Co., 148 Mass. 207; 2 L. R. A. 83; 12 Am. St. Rep. 541. Somewhat to the contrary (as to mere curiosity), De Kay v. Chicago, etc. R. Co., 41 Minn. 178; 4 L. R. A. 632; 16 Am. St. Rep. 687.

CHAPTER XVII.

CARRIERS OF PASSENGERS — DUTY OF CARRIER AS TO HIS VEHICLES, ROADWAY AND APPLIANCES.

The general duty of a carrier of passengers is of a lower degree than that of a carrier of goods, because the carrier has a less absolute control over the person of the passenger than he has over goods, and the passenger is deemed capable of judging for and helping himself in case of emergency. The liability of the carrier of passengers is therefore not that of an insurer, but only to use the highest degree of care, diligence and foresight. His duty has been expressed as follows: "The contract of a railway company as carrier of passengers, is to use due (extending to a high degree of) care, including the duty of exercising vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. The duty applies to the construction and maintenance as well of the line as of the carriages; and in the case where the company contract to carry over a line other than their own, extends to that other line. But it does not amount to a warranty of safe carriage, nor does it make the company liable for damage by an occurrence which could not be prevented by the use of skill and foresight."[1] This rule states the universal American doctrine, so far as insurance or warranty is concerned. The prevailing doctrine is well stated by an approved text writer in the note below.[2]

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[1] "Rule," 5 Eng. Rul. Cas., under Gt. W. Ry. Co. v. Blake, 7 H. & N. 987; Readhead v. Midland Ry. Co., L. R., 2 Q. B. 412; 4 Q. B. 379.

[2] Edwards on Bailments, § 710: "The law requires passenger carriers to provide and use coaches and other vehicles that are safe and sufficient for the

The doctrine thus expressed is adhered to by all the American courts down to the present time. The carrier is not an insurer of his vehicles and appliances, nor of the passenger's safety, and yet the measure of his duty is not to be determined by what a reasonably and ordinarily prudent person would do in the circumstances, but he is held

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journey or business in which they are employed; McPadden v. N. Y. Cent. R. Co., 44 N. Y., 478, citing the Readheard case; it requires them to examine their conveyances previous to the commencement of each trip or journey, and to prepare them carefully for the road, Ware v. Gay, 11 Pick. 106; Ingalls v. Bills, 9 Metc. 1; 43 Am. Dec. 346. Railroad companies are under the same obligation to provide safe and secure cars, with engines and machinery in good order. They are common carriers of passengers, and they are held to the same standard or degree of diligence as carriers by other and older modes of conveyance, with this qualification: that the foresight and vigilance required by the rule must cover the roadway and rails, engines, cars, couplings and other appliances used in the business. Brown v. N. Y. Cent. R. Co., 34 N. Y. 404; McElroy v. Nashua, etc., R. Corp., 4 Cush. 400; 50 Am. Dec. 794; Virginia C. R. Co. v. Sanger, 15 Gratt. 230. They do not actually guarantee the safety of the roads and bridges used by them; Toledo, etc., R. Co. v. Conroy, 61 Ill. 162; but they are answerable for the use of the greatest skill and diligence, in their construction, and are liable for any discoverable defects in the material or in the manufacture of them; Hegeman v. West. R. Corp., 13 N. Y. 9; 64 Am. Dec. 517; Steinweg v. Erie Ry. Co., 43 N. Y. 123; 3 Am. Rep. 373; Caldwell v. N. J. St. Co., 47 N. Y. 282; they cannot escape liability by showing that they were made by a skillful workman; Sharp v. Gray, 9 Bing. 457; Francis v. Cockrell, L. R., 5 Q. B., 184; they must answer for the proper construction and sufficiency of their cars and engines, when they purchase them, to the same extent as when they purchase the materials and manufacture these conveyances for their own use; Meier v. Penn. R. Co., 64 Pa. St. 225; 3 Am. Rep. 581; Caldwell v. N. J. St. Co., *supra;* Hegeman v. West R. Corp., *supra.* The rule of diligence covers all the means by which the business of carrying passengers is carried on; it requires that the railway carrier shall use the utmost vigilance, aided by the highest skill, to construct and perfect its road and track, and to keep them in a safe condition; and to equip it with cars and engines adequate and sufficient for the safe conveyance of its passengers; and it requires that the carrier shall, in the performance of this duty, use every and all means which existing science furnishes, to guard against or to remedy

to the highest degree of practicable care, foresight and vigilance.[1]

The American cases generally hold the carrier to a stricter responsibility for the safety of his vehicles than the English courts, making him liable for defects in the manufacture discoverable by any known test. There is however some conflict of decision on this point. Thus it has been adjudged by some courts that if the carrier purchases vehicles from reputable manufacturers, giving such examination as is practicable and usual among prudent carriers using similar vehicles, he is not responsible for defects not discoverable upon such examination, although they might have been discovered in the process of manufacture.[2] But this view is not generally prevalent, and the

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defects in the construction or management of its cars and other passengers so as to insure the safety of passengers."

[1] Railroad Co. v. Roy, 102 U. S. 456; Palmer v. Penn. Co., 111 N. Y 488; 2 L. R. A. 252; Libby v. Maine Cent. R. Co., 85 Me. 34; 20 L. R. A. 812; Spellman v. Lincoln Rapid T. Co., 36 Neb. 890; 20 L. R. A. 316; Louisville, etc., R. Co. v. Snider, 117 Ind 435; 3 L. R. A. 434; 10 Am. St. Rep. 60; Dodge v. Boston, etc., S. Co., 148 Mass. 207; 2 L. R. A. 83; 12 Am. St. Rep. 541; Treadwell v. Whittier, 80 Cal. 575; 5 L. R. A. 498; 13 Am. St. Rep. 175; Louisville, etc., R. Co. v. Lucas, 119 Ind. 583; 6 L. R. A. 193, with notes and references; Burt v. Douglas, etc, Ry. Co., 83 Wis. 229; 18 L. R. A. 479 (imperfectly insulated handrail on electric car); Stockton v. Frey, 4 Gill, 406; 45 Am. Dec. 138; Farish & Co. v. Reigle, 11 Gratt. 697; 62 Am. Dec. 666. The case of Alden v. N. Y. Cent. R. Co., 26 N. Y. 102; 82 Am. Dec. 401, which held the carrier liable as an insurer for the absolute safety of his vehicles, is discredited and overruled by the later New York and English cases, and has nowhere been followed. See note, 82 Am. Dec. 404.

[2] Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537; 31 Am. Rep. 321, citing the English Richardson and Readhead cases, *supra*, with approval, observing of the latter: "The New York cases which were relied on upon the argument of the present cause were considered in the light of a large number of decisions, and disapproved, as we think, correctly. They entirely ignore the true ground of responsibility, as depending on the actual negligence of the carrier. There is no such thing as implied negligence where there is none in fact."

American cases almost universally hold the carrier responsible for the avoidable negligence of the manufacturers.[1]

The carrier is not bound to adopt all precautions known to science, unless they are in practical use,[2] nor if the price is excessive and they are not necessary.[3]

The carrier's liability has been extended to the cases of an unsafe berth and an unsafe stairway on a steamer,[4] but not to keeping the deck of a vessel or the platform of a car free from ice.[5]

A horse railway company must use care in the selection of its horses in order to procure those that are safe.[6]

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[1] Note to the Huntley case, 31 Am. Rep. 321, where the present writer quotes and approves Hutchinson on Carriers, § 512, as follows: "Notwithstanding what may be said in some of the cases, the better opinion and the decided weight of authority is in favor of the position that so far as the passenger is concerned the carrier is responsible for the negligence of the manufacturer;" adding: "So far as we know, the contrary doctrine is asserted only in the Michigan and Tennessee cases" (citing Nashville, etc., R. Co. v. Jones, 9 Heisk. 27). "The courts are unquestionably in error in saying that the Hegeman case is generally denied in the United States. It is only the Alden case that is so denied. * * * It seems to us there is no escape from the reasoning in Francis v. Cockrell, L. R., 5 Q. B. 184. The passenger cannot look to the manufacturer; the carrier can; therefore the passenger can look to the carrier. Any other rule would leave the passenger remediless." Thompson on Carriers of Passengers, p. 221, says: "The negligence of the manufacturer of a railway coach is to be imputed to the carrier." See note, 64 Am. Dec. 525.

[2] Steinweg v. Erie Ry. Co., 43 N. Y. 123; 3 Am. Rep. 373 (spark arrester); New Orleans, etc., R. Co. v. Faler, 58 Miss. 911 It would seem however that the natural tendency of this rule would be to prevent the adoption of any improvements, because no one carrier is bound to be the first to adopt them.

[3] Le Barron v. E. B. F. Co., 11 Allen, 312; Natchez, etc., R. Co. v. McNeil, 61 Miss. 434.

[4] Railroad Co. v. Walrath, 38 Ohio St. 461; 43 Am. Rep. 433.

[5] Fearn v. West. J. F. Co., 143 Pa. St. 122; 13 L. R. A. 366; Palmer v. Penn. Co., *supra*.

[6] Noble v. St. Jo., etc., R. Co., 98 Mich. 249.

CHAPTER XVIII.

CARRIERS OF PASSENGERS—CONTRACT EXPRESS OR IMPLIED—TICKETS—CONNECTING CARRIERS.

It is the carrier's implied contract that he shall transport the passenger safely and promptly, so far as the utmost care, skill and diligence can accomplish it.

Bounded by the limitations described in the last chapter, in respect to his duty as to his vehicles, roadway and other appliances, the carrier is impliedly bound to the highest degree of care, diligence and foresight in respect to the management of his road and vehicles, and is liable for any omission in this regard, whether from his own neglect or want of skill or foresight, or that of his agents or servants, resulting in delay or physical injury to the passenger. He is held to the highest measure of skill and care, to avert accidents, and if his negligence unites with the act of God in producing an injury, he is regarded as responsible. Although his roadway may be perfect, and his vehicles of the best description and in the best condition, yet if carelessness or unskillfulness in the use and management of them brings about or contributes to a disaster, he must answer for it. For example, if a railway train should carelessly collide with another on its own road or at a railway crossing, or should negligently run into a land-slide produced by a sudden and unprecedented flood, by reason of want of a look-out, or of sand in the box to apply to slippery rails, the carrier would be responsible, and so if a train should be run at a reckless degree of speed.[1]

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[1] Tuller v. Talbot, 23 Ill. 357; 76 Am. Dec. 695 (stage coach driver permitting passenger to drive): "Passengers undertake to run those risks only which cannot be avoided by the utmost degree of care and skill, on the part of the car-

The carrier is also liable in damages for any delay in the carriage of the passenger growing out of his fault. He is held to the same measure of responsibility in this respect as in regard to the safety of his passenger. If he advertises a time-schedule he is bound to conform to it, unless rendered unable by some unavoidable cause, for the reason that the travelling public have a right to rely on his public representations as to this matter.[1]

The carrier in this country may not impose on the paying passenger an agreement exempting him from liability for delay or personal injury to him by his negligence or that of his servants. The rule is the same as in respect to the carrier of goods. But in England he is permitted to do so except as prohibited by statute.[2]

The carrier may not impose upon the paying passenger, against his consent, any limitation of his liability for injury to the passenger in the foregoing respects by notice, or condition in his tickets, or otherwise, so far as his own route is concerned. He may not stipulate for immunity for the negligence or unskillfulness of himself or his servants.[3] But if he sells a ticket to a point beyond his own terminus, he may insert therein a valid condition that he shall not be responsible beyond his own line.[4]

If he sells an unconditional ticket to a point beyond his own line, his liability for injury to the passenger's person

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rier, in the preparation and management of the means of conveyance." Mad River, etc., R. Co. v. Barber, 5 Ohio St. 541; 67 Am. Dec. 312. Balt. & O. R. Co. v. Worthington, 21 Md. 275; 83 Am. Dec. 578 (misplaced switch).

[1] Hamlin v Gt. N R. Co., 1 H. & N. 408; Hurst v. Gt. W. R. Co., 19 C. B. [N. S.], 310; Weed v. Panama R. Co., 17 N. Y. 362; 72 Am. Dec. 474. So he is bound to notify the public of changes in the time-table. Sears v. Eastern R. Co., 14 Allen, 433; 92 Am. Dec. 780. The carrier is not excused even if the delay was caused by the willful act of his servants. Weed v. Panama R. Co., *supra*.

[2] Steam Co. v. Insurance Co., 129 U. S. 397.

[3] Harris v. Howe, 74 Tex. 534; 15 Am. St. Rep. 862; 5 L. R. A. 777

[4] Harris v. Howe, *supra*.

or by delay in the carriage is a question somewhat mooted, and some of the courts make a distinction between the one and the other. He may undoubtedly render himself liable for either by express contract, but in this country he is not generally considered liable for his passenger's safety, although he is for his prompt carriage, by the sale of an unconditional ticket beyond his own route.[1]

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[1] In England the carrier in such circumstances is held to the largest responsibility. Gt. W. Ry. Co. v. Blake, 7 H. & N. 987; Readhead v. Midland Ry. Co., L. R., 2 Q. B. 412; 5 Eng. Rul. Cas. 436. In this country, the English rule has been applied as to injury by delay. Carter v. Peck, 4 Sneed, 203; 67 Am. Dec. 604; cases in note, 59 Am. Dec. 447. But the cases distinguish between passengers and goods, as to physical injury, on the ground that "passengers take care of themselves." So it has been held in a number of cases that the carrier is not liable for an injury to the passenger's person upon the line of another connecting carrier over which he has sold a ticket, unless he has control of it, or there is some partnership or common interest between the companies. Sprague v. Smith, 29 Vt. 421; 70 Am. Dec. 424; Nashville, etc., R. Co., v. Sprayberry, 8 Baxt 341; 35 Am. Rep. 705; Hood v. N. Y., etc., R. Co., 22 Conn. 1; Champion v. Bostwick, 18 Wend. 175; 31 Am. Dec. 336; Atchison, etc., R. Co. v. Cochran, 43 Kans. 225; 7 L. R. A. 414; 19 Am. St Rep 129; Hutch. Carr. 464, Redf. Railways, 313. Other cases deny any difference between freight and passengers in this particular. Harris v. Howe, *supra* (*obiter*), and where there was no change of cars the carrier was held liable for personal injury on a connecting road. Chollette v. Omaha, etc, R. Co., 26 Neb. 159; 4 L. R. A. 135. And so in the case of a special excursion train to a point beyond the carrier's route. Washington v. Raleigh, etc., R. Co., 101 N. C. 239; 1 L. R. A. 830. If a carrier's trains run on the line of another, the former is liable. Hutch. Carr. § 514; Gt. W. Ry. Co. v. Blake, 7 H. & N. 987; 5 Eng. Rul. Cas. 431; Sprague v. Smith, *supra;* Candee v. Penn. R. Co., 21 Wis. 582; 94 Am. Dec. 566; Toledo, etc., R. Co. v. Rumbold, 40 Ill. 143; Wyman v. Railroad, 46 Me. 162; Nelson v. Railroad, 26 Vt. 717; Schopman v. Railroad, 9 Cush. 24; 55 Am. Dec 41. But not where only the cars are run and the motive power and the management are furnished by the other road. Smith v. St Louis, etc., R. Co., 85 Mo. 418; 55 Am. Rep. 380. If the carrier contracts to carry the passenger to a certain destination, he is responsible for his safety throughout the whole distance, "whether the franchise and the means of conveyance, where the injury or loss occurs, be owned or controlled by him or some other carrier." Thomp.

The carrier may however impose reasonable conditions upon the sale of tickets, giving notice thereof on the ticket itself. He may condition the ticket to be "good this day only;" "good within six months;" "coupon to be void if detached by any one but conductor;" "to be used on or before a given day;" "good on certain trains only;" "good only two days after date;" "not to be good for return trip unless signed by the purchaser and stamped and dated by ticket agent at a certain place."[1]

It is an implied condition that a ticket from A. to B. is not good in the reverse direction,[2] nor on a circuitous route when there is also a direct one.[3]

Even if a ticket is not conditioned to be good only for a continuous trip, it has been held that the passenger is not

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Carr. Pass. 423; Quimby v. Vanderbilt, 17 N. Y. 306; 72 Am. Dec. 469. But this contract is not implied from merely selling a through ticket. Note, 32 Am. Dec. 230; Harris v. Howe, *supra;* Kessler v. N. Y., etc., R. Co., 61 N. Y. 538.

[1] Elmore v. Sands, 54 N. Y. 512; 13 Am. Rep. 617; Lillis v. St. Louis, etc., R. Co., 64 Mo. 464; 27 Am. Rep. 255; Louisville, etc., R. Co. v. Harris, 9 Lea, 180; 42 Am. Rep. 668; Auerbach v. N. Y. Cent., etc., R. Co., 89 N. Y. 281; 42 Am. R. 290; Ohio, etc., Ry. Co. v. Swarthout, 67 Ind. 567; 33 Am. Rep. 104; Boston & L. R. Co. v. Proctor, 1 Allen, 267; 79 Am. Dec. 729; Edwards v. Lake S., etc., Ry. Co., 81 Mich. 364; 21 Am. St. Rep. 527. The passenger having duly entered on the journey is not bound to complete it within the limited time. Lundy v. Cent. P. R. Co., 66 Cal. 191; 56 Am. Rep. 100. But if the journey is interrupted by accident without his fault he can not demand to resume it after that time. Gulf, etc., R. Co. v. Looney, 85 Tex. 158; 16 L. R. A. 471; 34 Am. St. Rep. 787. And if he has a coupon ticket over connecting lines, a coupon need not be honored unless presented within the time designated, although the passenger began his journey at the earliest possible time and the delay is through the fault of a previous connecting line; his remedy is against the line in fault. Gulf, etc., Ry. Co. v. Looney, 85 Tex. 158; 34 Am. St. Rep. 787; 16 L. R. A. 471. "Good for this trip only," refers to journey, and not to date of ticket. Pier v. Finch, 24 Barb. 514.

[2] Keeley v. B. & M. R. Co., 67 Me. 163, 24 Am. Rep. 19.

[3] Bennett v. N. Y. Cent. R. Co., 69 N. Y. 594; 25 Am. Rep. 250. But a street car transfer ticket apparently applicable to several lines may be used on either. Pine v. St. Paul, etc., R. Co., 50 Minn. 144; 16 L. R. A. 347.

entitled to stop over at an intermediate station and resume his trip on the same ticket, without permission.[1]

Where a passenger is carried gratuitously, the voucher for his passage may lawfully provide that the carrier shall not be liable in any event, even for the negligence of himself or his servants.[2] This is on the ground that where

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[1] McClure v. Phila., etc., R. Co., 34 Md. 532; 6 Am. Rep. 345; Shedd v. T. & B. R. Co., 40 Vt. 88; Dietrich v. Penn. R. Co., 71 Pa. St. 432; 10 Am. Rep. 711; Churchill v. Chicago, etc., R. Co., 67 Ill. 390; Cheney v. B. & M. R. Co., 11 Metc. 121; 45 Am. Dec. 190, and note, 193; Johnson v. Concord R. Co., 46 N. H. 213; 88 Am. Dec. 199; Stone v. C. & N. W. R. Co., 47 Iowa, 82; 29 Am. Rep. 458.

[2] Kinney v. Cent. R. Co., 34 N. J. 513; 3 Am. Rep. 265; 14 How. 468; Wells v. N. Y. Cent. R. Co., 24 N. Y. 181; Ill. C. R. Co. v. Read, 37 Ill. 484; 87 Am. Dec. 260; Rogers v. Kennebec St. Co., 86 Me. 261; 25 L. R. A. 491; Griswold v. Railroad Co., 53 Conn. 371; Quimby v. Railroad Co., 150 Mass. 365. This view however is strenuously opposed in Jacobus v. St. Paul, etc., Ry. Co., 20 Minn. 125; 18 Am. Rep. 360, upon the ground that such a condition is against public policy, as it tends to create a disregard "for his safety as a citizen of the state." Citing Illinois Cent. R. Co. v. Read, 37 Ill. 484: Indiana Cent. R. Co. v. Mundy, 21 Ind. 48; 83 Am. Dec. 339; Penn. R. Co. v. McCloskey's Adm'r, 23 Pa. St. 526; Mobile & Ohio Ry. v. Hopkins, 41 Ala. 486; Gulf, etc., Ry. Co. v. McGown, 65 Tex. 640; Railroad Co. v. Curran, 19 Ohio St. 1. This seems rather fanciful, and as savoring too much of judicial paternalism. The view taken by the court in the Maine case, above cited, seems more commendable: "The term 'public policy' or 'policy of the law' suggests but a vague and uncertain principle, and sometimes seems to be invoked as authority for a decision when a more definite reason cannot readily be assigned. In what manner the public welfare or the safety of human life is involved, or any of the cherished interests of the law are invaded, by allowing one out of a hundred passengers to travel on a pass at his own risk, does not clearly and satisfactorily appear. In most instances, it is believed, free passes are solicited by the traveler, not proffered by the carrier. The fact that a gratuitous passenger must travel at his own risk will surely operate as an incentive to greater care and caution on his part, and tend to diminish the number of passes issued. The probability that the cases of free transit will be so numerous as to induce any relaxation of the rules of prudence and vigilance on the part of the carrier is too remote to have weight as argument. He is constantly, and, it would seem, sufficiently, reminded of his obligations to the public, in the

there is no consideration for the carriage the carrier owes no active duty to the passenger. Yet where the passenger is carried free, so far as he is personally concerned, but in consideration of compensation being paid for the simultaneous carriage of his property needing his care, such as cattle, the question whether the carrier may stipulate for immunity for negligence is very much mooted, very influential courts being strongly opposed on the subject. Holding the view that the condition is void, the Supreme Court of the United States is ranged with much the more numerous following; on the other side New York is the leading authority, with quite a number of influential courts.[1]

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most forcible and effective manner, by the numerous claims and large verdicts in favor of those injured who travel for hire." Some of the cases allowing the carrier to contract for exemption for negligence still hold him liable in such case for gross negligence or willful misconduct. Wells v. N. Y. Cent. R. Co., *supra*; Perkins v. Same, 24 N. Y. 196; Annas v. Milwaukee, etc., R. Co., 67 Wis. 46; 58 Am. Rep. 848, note.

[1] Railroad Co. v. Lockwood, 17 Wall. 357; 10 Am. Rep. 366; Ohio & Miss. Ry. Co. v. Selby, 47 Ind. 471; 17 Am. Rep. 719. In the latter case is a valuable list of decisions on both sides, arraying on the side of the drover, cases in Pennsylvania, Ohio, Maine, Massachusetts, Delaware, Kentucky, South Carolina, Georgia, Alabama, Mississippi, Louisiana; so also Maslin v. Balt., etc., R. Co., 14 W. Va. 180; 35 Am. Rep. 748; Carroll v. Mo. Ry. Co., 88 Mo. 239; 57 Am. Rep. 382; Black v. Goodrich Trans. Co., 55 Wis. 319; 42 Am. Rep. 713. And on the side of the carrier, Poucher v. N. Y. Cent. R. Co., 49 N. Y. 263; 10 Am. Rep. 364; and many other New York cases, and cases in New Jersey, Connecticut, Vermont, Illinois, Michigan and Maryland. With the latter must be arrayed the English courts; Gallin v. L. & N. W. R. Co., L. R., 10 Q. B. 212; 12 Moak's Eng. Rep. 268. The rule of New York seems to be pronounced with some hesitation. Thus in Smith v. N. Y. Cent. R. Co., 24 N. Y. 222, the judgment below was affirmed without any agreement on this particular point, three judges arraying themselves on each side of the question, and in Bissell v. N. Y. Cent. R. Co., 25 N. Y. 442, the present doctrine was adopted by four against three, including Chief Justice Denio. In the last case, Selden, J., observed: "The principle being established that railroads may, by contract, relieve themselves from the negligence of their servants in the carrying of passengers when carried gratuitously, I can discover no rule of law or public policy to prevent

It is generally held as to a non-transferable ticket requiring the signature of the passenger, that the contract is found in its conditions and not in representations made by an officer of the company;[1] and though he is not required to sign it, he is still bound by the terms of the conditions.[2]

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their doing it on any other terms which may be agreed upon between them and their passengers, and which shall furnish a consideration to the passengers for the risk which they assume. All the arguments which have been urged against the propriety and safety of allowing carriers to make such contracts apply with as much force to cases where passengers are carried gratuitously as where they are carried for reward. So far as the public are concerned, the question of reward is one of indifference, and so far as the parties are concerned, if they are allowed to make the contract at all, they are the judges of the amount of consideration which will compensate them for assuming the risk, whether the whole fare, or half, or an eighth, or any other proportion or consideration. I apprehend it is entirely safe to leave them to fix the terms." He was of opinion that Bissell was, according to the wording of the pass, "riding free to take charge of the stock." In Annas v. Milwaukee, etc., R. Co., 67 Wis. 46; 58 Am. Rep. 848, note, is a very exhaustive review of the authorities as to gratuitous passengers and drovers. At all events, there must be some assent to the stipulation by the person carried. It cannot be implied merely from the custom of the carrier to exact such a release. Lawson v. Chic., etc., Ry. Co., 64 Wis. 447; 54 Am. Rep. 634. As to mail-agents and express messengers, see *ante*, page 150. Upon principles of comity, a stipulation for exemption made in a State where it is valid, concerning a contract to be wholly executed there, is held valid when called in question in another, where it would be invalid if executed there. Knowlton v. Erie Ry. Co., 19 Ohio St. 260; 2 Am. Rep. 395. The carrier cannot evade his liability by a pass to a drover by which he agrees to be regarded simply as an employee of the carrier. Mo. P. Co. v. Ivy, 71 Tex. 409; 1 L. R. A. 500; 10 Am. St. Rep. 758.

[1] Mosher v. Railroad Co., 127 U. S. 390; Ill. Cent. R. Co. v. Read; 37 Ill. 484; Railroad Co. v. McGowan, 26 Am. & Eng. R. Cas. 274; Fonseca v. Cunard S. Co., 153 Mass. 553; 12 L. R. A. 340; 25 Am. St. Rep. 660. But *contra:* Kansas City, etc., R. Co. v. Rodebaugh, 38 Kans. 45; 5 Am. St. Rep. 715; Freeman v. Detroit, etc., R. Co., 65 Mich. 577; Kent v. B. & O. R. Co., 45 Ohio St. 284; 4 Am. St. Rep. 539.

[2] Kent v. Baltimore & Ohio R. Co., *supra*, citing cases from New York, Pennsylvania and Massachusetts; *contra:* Fonseca v. Cunard S. Co., *supra*.

The weight of authority holds that there is no legal presumption that the passenger by accepting a conditional ticket knows and assents to its terms so far as it limits the carrier's liability for personal injuries by his negligence; and the burden of proof of knowledge by a passenger of a memorandum on his ticket limiting the carrier's liability, and of his assent to it, is on the carrier.[1]

The carrier may limit his liability in respect to the carriage of passengers on freight trains upon which it is not accustomed to carry them.[2]

It must always be kept in mind that the ticket is not the contract, but only evidence of the contract, and consequently parol evidence is always admissible to show a different oral contract from that indicated by the ticket.[3]

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[1] Baltimore & O. R. Co. v. Harris, 79 U. S. 65; and other cases in note, 12 L. R. A. 340, from New York, Massachusetts, Maine and England. In Richardson v. Rowntree [1894], App. Cas. 217, a steerage passenger received a ticket folded up so that no writing was visible unless she opened it. Upon it was printed: "It is mutually agreed for the consideration aforesaid that this ticket is issued and accepted upon the following conditions," one of which a limitation of liability to $100 for loss or injury to passenger or luggage "in any circumstances." In an action for personal injuries, the jury found that she knew there was writing and printing on the ticket, but did not know that it related to the terms of the contract of carriage, and that the carrier did not do what was reasonably sufficient to give her notice thereof. This was affirmed by the House of Lords.

[2] Arnold v. Ill. Cent. R. Co., 83 Ill. 273; 25 Am. Rep. 383.

[3] Wilson v. Railroad Co., 21 Gratt. 654; Quimby v. Vanderbilt, 17 N. Y. 306; 72 Am. Dec. 469; Burnham v. Gr. T. Ry. Co. 63 Me. 298; 18 Am. Rep. 220; Railroad Co. v. Winters' Adm'rs, 143 U. S. 60; Mann Boudoir Co. v. Dupre, 54 Fed. Rep. 646; 21 L. R. A. 289; Nichols v. So. P. Ry. Co., 23 Oreg. 123; 18 L. R. A. 55. But if the ticket limits the time for which it is good, this cannot be contradicted, in the absence of fraud or negligence on the part of the company's agent, misleading the passenger. Gulf, etc., R. Co. v. Daniels, — Tex Civ. App. —; 29 Southwestern Rep. 426.

CHAPTER XIX.

CARRIERS OF PASSENGERS—DUTY TOWARD THE PASSENGER PERSONALLY.

The carrier owes certain duties toward the person of the passenger from the moment he comes upon his premises for the purpose of being carried, until he leaves them. But these duties do not attach until the person comes upon his premises.[1] A carrier by water is bound to a high degree of care in keeping the approaches to his vessel safe —the wharf, the gang-plank, the ferryboat apron, etc. A carrier by land is likewise bound as to his office or station, the platforms, and the approaches thereto and to his trains.[2]

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[1] The relation of carrier and passenger does not exist between a street railway company and a person who has given a signal, which was seen and responded to, for a car to stop, but who was struck by the unexpected swinging of the car from its proper track on to a switch track. Donovan v. Hartford St. R. Co., 65 Conn. 201; 29 L. R. A. 297. Citing Creamer v. West End St. R. Co., 156 Mass. 320; 16 L. R. A. 490; Platt v. Forty-Second St. & G. St. Ferry R. Co., 2 Hun, 124; and observing: "A common carrier is bound to exercise a high degree of care towards those who have put themselves under his care as passengers, but not until they have thus put themselves under his care. Up to that time, although they may have contracted with him for their future transportation, he owes no more care to them than to any third party. His special duty begins when, by coming upon his premises, or in the act of entering his vehicle, the actual relation of passenger to carrier is assumed."

[2] Rogers v. Kennebec St. Co., 86 Me. 261; 25 L. R. A. 491; Indiana Cent. Ry. Co. v. Hudelson, 13 Ind. 325; 74 Am. Dec. 254; Moses v. Louisville, etc., R. Co., 39 La. Ann, 649; 4 Am. St. Rep. 231; Nichols v. Wash., etc., R. Co., 83 Va. 99; 5 Am. St. Rep. 257; Cross v. Lake Shore, etc., Ry. Co., 69 Mich. 363; 13 Am. St. Rep. 399; Delaware, etc., R. Co. v. Trautwein, 52 N. J. L. 169; 19 Am. St. Rep. 442; Penn. Co. v. Marion, 123 Ind. 415; 18 Am. St. Rep. 330; Missouri P. Ry. Co. v. Neiswanger, 41 Kans. 621; 13 Am. St. Rep. 304; Loftus v. Union Ferry Co., 84 N. Y. 455; 38 Am. Rep. 533; May v Hanson, 5 Cal. 360; 63 Am. Dec. 135. But this does not extend to the protection of passen-

This duty, however, ceases on the abandonment of the intention to take passage.[1] The duty extends to persons who come with the passenger, whether to assist him or as a mere act of friendship; they are also entitled to ample notice to enable them to leave the cars safely.[2] It also extends to persons coming upon the carrier's premises to meet an arriving traveller.[3] But it does not extend to persons who come on his premises from mere curiosity or to subserve their own convenience.[4]

The carrier may exclude from his premises or vehicles persons who desire to use them merely for the conduct of their own business.[4]

The carrier may require the passenger to procure his ticket before taking the train, and may impose an addi-

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gers from infection by a contagious disease from which a ticket-seller is suffering without the carrier's knowledge. Long v. Chicago, etc., R. Co., 48 Kans. 28; 30 Am. St. Rep. 271; 15 L. R. A. 319.

[1] Heinlein v. Boston, etc., R. Co., 147 Mass. 136; 9 Am. St. Rep. 676.

[2] Louisville, etc., R. Co. v. Crunk, 119 Ind. 542; 12 Am. St. Rep. 443; Doss v. Mo., etc., R. Co., 59 Mo. 27; 21 Am. Rep. 371; Little Rock, etc., R. Co. v. Lawton, 55 Ark. 428; 29 Am. St. Rep. 48; 15 L. R. A. 434; York v. Canada, etc., St. Co., 22 Can. S. C. 167. The carrier must furnish safe passage to and from its mail cars for persons desiring to mail letters thereon. Hale v. Grand Trunk R. Co., 60 Vt. 605; 1 L. R. A. 187. But as to a woman who goes at night to a railway station with her husband, to see him off on a freight train which does not carry passengers, but on which he ships horses and accompanies them on the passage by contract with the company, the company is not bound to keep lights and railings on the station platform. Dowd v. Chicago, etc., R. Co., 84 Wis. 105; 20 L. R. A. 527; 36 Am. St. Rep. 917. One who goes to a railway station as a mere spectator and for his own pleasure or convenience is there at his own risk and peril except as to gross and wanton negligence. Burbank v. Illinois C. R. Co., 42 La. Ann. 1156; 11 L. R. A. 720.

[3] Cherokee Packet Co. v. Hilson, — Tenn. —; 31 S. W. Rep. 737.

[4] Fluker v. Georgia, etc., Co., 81 Ga 461; 12 Am. St. Rep. 328; 2 L. R. A. 843; Smallman v. Whilter, 87 Ill. 545; 29 Am. Rep. 76. He may grant exclusive business privileges on his premises and vehicles. Old Colony R. Co. v. Tripp, 147 Mass. 35; 9 Am. St. Rep. 661; Barry v. Oyster Bay, etc., Co., 67

tional amount of fare for failure to do so.[1] But he must give the passenger ample opportunity and time to buy his ticket, and unless he affords this, the passenger may pay the regular fare on the train, and no more can be exacted from him.[2]

He must give the passenger time to board the train safely,[3] although he may start it before the passenger reaches his seat.[4]

Although the passenger has procured a ticket he may be excluded from the train if he is drunk or offensive or disorderly.[5]

N. Y. 301; 23 Am. Rep. 115. *Contra:* Kalamazoo, etc., Co. v. Sootsma, 84 Mich. 194; 22 Am. St. Rep. 693; Montana U. Ry. Co. v. Langlois, 9 Mont. 419; 18 Am. St. Rep. 745. The conflict in the authorities on this point is thus solved in a note reviewing all the authorities, 22 Am. St. Rep. 699: "The better reasoning sustains the doctrine approved in the principal case, namely: that a railway company or other common carrier may exclude all persons from its depot or grounds who are not using or seeking to use its means of carriage, but it cannot grant an exclusive right or more favorable preference to one individual or company engaged in soliciting patronage from its passengers than it gives to another individual or company engaged in the same line of business."

[1] Toledo, etc., Ry. Co. v. Wright, 68 Ind. 586; 34 Am. Rep. 277; McGowan v. Morgan's Co., 41 La. Ann. 732; 17 Am. St. Rep. 415; Reese v. Penn. R. Co, 131 Pa. St. 422; 17 Am. St. Rep. 818. A passenger on a street car may pay on the car, and he is not bound to tender the exact fare, but the conductor must make change to a reasonable amount ($5). Barrett v. Market St., etc., R. Co., 81 Cal. 296; 6 L. R. A. 336. The conductor or driver may lawfully be required to keep tickets for sale. Sternberg v. State, 36 Neb. 307; 19 L. R. A. 570; Detroit v. Fort Wayne, etc., R. Co., 95 Mich. 456; 35 Am. St. Rep. 580; 20 L. R. A. 79.

[2] Evans v. Memphis, etc., R. Co., 56 Ala. 246; 28 Am. Rep. 771.

[3] Akersloot v. Second Ave. R. Co., 131 N. Y. 599; 15 L. R. A. 489; Steeg v. St. Paul, etc., Co., 50 Minn. 149; 16 L. R. A. 379.

[4] Yarnell v. Kans., etc., R. Co., 113 Mo. 570; 18 L. R. A. 599. A passenger in an elevator must be given a reasonable time to obtain a firm footing before starting. Mitchell v. Marker, 62 Fed. Rep. 139; 25 L. R. A. 33.

[5] Pittsburgh, etc., Ry. Co. v. Vandyne, 57 Ind. 576; 26 Am. Rep. 68.

Having admitted him to the train, the carrier is bound to furnish the passenger a seat.[1]

As has been shown, the carrier may make reasonable regulations as to what trains passengers may ride on. See *ante*. In like manner, the carrier may make reasonable regulations as to the particular car to which the passenger shall be admitted, according to the fare paid. He may direct that colored people shall go in a separate car; and so of persons desiring to smoke; and he may exclude men unaccompanied by women from a car provided for women and men accompanying them.[2]

The carrier may not subject the passenger, even in a

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[1] Davis v. Kans. City, etc., R. Co., 53 Mo. 317, 14 Am. Rep. 457; Louisville, etc., R. Co. v. Patterson, 69 Miss. 421; 22 L. R. A. 259; Memphis, etc., R. Co. v. Benson, 85 Tenn. 627; 4 Am. St. Rep. 776; Hardenbergh v. St. Paul, etc., Ry. Co., 39 Minn. 3; 12 Am. St. Rep. 610. If there is no seat in the common cars the passenger may take one in a drawing-room or sleeping car forming part of the train, without paying extra for it, although the car does not belong to the railroad company. Thorpe v. N. Y. C., etc., R. Co., 76 N. Y. 402; 32 Am. Rep. 325. But if ejected for refusing his ticket or fare because he is not furnished with a seat, he cannot recover therefor, but only for breach of the contract to carry. St. Louis, etc., Ry. Co. v. Leigh, 45 Ark. 368; 55 Am. Rep. 558. He should leave the train at the first stop. Memphis, etc, R. Co. v. Benson, *supra*. A woman who takes passage in a baggage car when no passenger cars are provided for a passenger train, and pressing domestic duties call for her immediate transportation, does not thereby renounce her right as a passenger to safety and protection. Baltimore & P. R. Co. v. Swann (Md.), — L. R. A. —; 32 Atl. Rep. 175.

[2] Memphis, etc., R. Co. v. Benson, *supra*; Bass v. Chicago, etc., Ry. Co., 36 Wis. 450; 17 Am. Rep. 495; Chicago & N. W. Ry. Co. v. Williams, 55 Ill. 185; 8 Am. Rep. 641; *Ex parte* Plessy, 45 La. Ann. 80; 18 L. R. A. 639, and cases in notes; Britton v. Atlanta, etc., Co., 88 N. C. 536; 43 Am. Rep. 749; Westchester, etc., Co. v. Miles, 55 Pa. St. 209. But he may not exclude a colored woman from a woman's car simply on account of her color. Chicago & N. W. Ry. Co. v. Williams, *supra*. Nor can he compel a colored person to take inferior accommodations, though at reduced rates. Coger v. N. W., etc., Co., 37 Iowa, 147.

second-class car, to hearing profane or obscene language or witnessing violent or drunken conduct.[1]

On the other hand, the passenger may be ejected on account of his own disorderly or offensive conduct,[2] and from a street car when he is unable to sit up and offensively sick, although without his fault.[3]

If the carrier accepts a sick, feeble, blind, or crippled passenger, without an attendant, he is bound to use extra care toward him on the route and to aid him in leaving the conveyance.[4] And if it becomes necessary to remove a

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[1] St. Louis, etc., R. Co. v. Mackie, 71 Tex. 491; 1 L. R. A. 667; 10 Am. St. Rep. 766.

[2] Railway Co. v. Valleley, 32 Ohio St. 345; 30 Am. Rep. 601; Peavy v. Georgia R. & B. Co., 81 Ga. 485; 12 Am. St. Rep. 334. If he has *delirium tremens* he may be removed at a station and put in charge of an overseer of the poor. Atchison, etc., R. Co. v. Weber, 33 Kans. 543; 52 Am. Rep. 543. Or he may be put in the baggage car. Sullivan v. Old C. R. Co., 148 Mass. 119; 1 L. R. A. 513.

[3] Lemont v. Wash., etc., R. Co., 1 Mackey, 180; 47 Am. Rep. 238; Louisville, etc., R. Co. v. Logan, 88 Ky. 232; 21 Am. St. Rep. 332; Paddock v. Atchison, etc., R. Co., 37 Fed. Rep. 841; 4 L. R. A. 231 (eruption mistaken for small-pox).

[4] Croom v. Chicago, etc., R. Co., 52 Minn. 296; 18 L. R. A. 602; Weightman v. Louisville, etc., R. Co., 70 Miss. 563; 35 Am. St. Rep. 660; 19 L. R. A. 671; Railway Co. v. Maddry, 57 Ark. 306; Foss v. Boston, etc., R. Co., N. H. Sup. Ct.; 11 L. R. A. 367. In Lake Shore, etc., Ry. Co. v. Salzman (Ohio Sup. Ct.), 40 N. E. Rep. 89, it was held that a railroad company is bound to give such care to a passenger who becomes sick on a train as is fairly practicable, with the facilities at hand, without unduly delaying the train or unreasonably interfering with the safety, comfort or convenience of the other passengers. The court observed: "In travel by ship, care and medical attendance are always provided by the company, as one of the necessities of the journey. In travel by rail, no such necessity exists, and therefore a railroad company is under no obligation to furnish hospitals on wheels, or physicians or nurses to attend the sick on their journeys. But without hospitals, and without physicians and nurses of their own, still much can be done to alleviate the pains and aches of a sick passenger. While the train is in motion, the passenger is utterly helpless as to aid except from those on the train. His

sick, drunken or insensible passenger from the carriage, that duty must be exercised in a humane manner, at a proper place, and with due regard to his subsequent safety.[1]

The carrier is bound to protect the passenger against and answer for all assaults, indignities, and wrongs committed by his servants in the course of the employment, without regard to the motive.[2] This is so even in the

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fellow-passengers owe him no duty except humanity. The alternative is presented of being cared for by his fellow-passengers, by the company, or to writhe in pain and sickness until relieved by death or the end of his journey. By taking passage and paying his fare the relation of carrier and passenger is established between the company and himself, and as he is under the control of the company for many purposes, and debarred by the rapid movement of its trains from receiving aid from the outside world, it would seem to follow as a necessity of the situation that those who have received his money, and are thus rapidly transporting him, should assume the obligation of taking reasonable care of him in case of sickness while on the train. This obligation is on the company, not only for the benefit of the sick person, but also for the comfort, and sometimes the safety, of the other passengers. A sick person, by his cries and moans may so annoy the other passengers as to require his removal to a separate department or from the train. In case of small-pox or cholera or other contagious disease, the comfort and safety of the other passengers would demand the early removal of the afflicted passenger from the train. The company would in such case be charged with the duty of removal, and reasonable care thereafter, until the afflicted person could be otherwise cared for. Railroad v. Weber, 33 Kans. 543; Conolly v. Railroad Co., 41 La. Ann. 57. It is therefore clear that the company owed a duty to the sick passenger, and was under obligation to take reasonable care of him — such care as was fairly practicable with the facilities at hand, without unreasonable delay of the train, or discomfort to the other passengers."

[1] Connolly v. Crescent City R. Co., 41 La. Ann. 57; 17 Am. St. Rep. 389; 3 L. R. A. 133; Paddock v. Atchison, etc., R. Co., 37 Fed. Rep. 841; Cincinnati, etc., R. Co. v. Cooper, 120 Ind. 469; 6 L. R. A. 241; Roseman v. Carolina C. R. Co., 112 N. C. 709; 34 Am. St. Rep. 524; 19 L. R. A. 327.

[2] Browne's Dom. Rel. 138; Dwinelle v. N. Y. Cent., etc., R. Co., 120 N. Y. 117; 8 L. R. A. 224; Lafitte v. N. O. City, etc., R. Co., 43 La. Ann. 34; 12 L. R. A. 337; Dillingham v. Anthony, 73 Tex. 47; 3 L. R. A. 634; Palmeri v. Manhattan R. Co., 133 N. Y. 261; 16 L. R. A. 136; 28 Am. St. Rep. 632;

case of a trespasser.[1] But not so unless they were committed in the course of the employment, as for example, in case of an assault having no reference to the relation of carrier and passenger, or an unauthorized arrest.[2] Many courts, however, render the carrier responsible for wanton assaults by its servants, upon passengers during the transportation and subject to their control, although the act is purely wanton and has no reference to promoting or regulating the carriage.[3]

Gillingham v. Ohio R. R. Co., 35 W. Va. 588; 14 L. R. A. 798; Hanson v. European, etc., Ry. Co., 62 Me. 84; 16 Am. Rep. 404; Bryant v. Rich, 106 Mass. 180; 8 Am. Rep. 311; Sherley v. Billings, 8 Bush. 147; 8 Am. Rep. 451; Texas, etc., R. Co. v. Williams, 62 Fed. Rep. 440.

[1] Farber v. Mo. P. R. Co., 116 Mo. 81; 20 L. R. A. 350.

[2] Browne's Dom. Rel. 138, 141–145; Mulligan v. N. Y., etc., R. Co., 129 N. Y. 506; 26 Am. St. Rep. 539; 14 L. R. A. 791; and so where the train was unnecessarily stopped in the midst of a mob of strikers who assaulted the passengers. Chicago, etc., R. Co. v. Pillsbury, 123 Ill. 9; 5 Am. St. Rep. 483. In Goodloe v. Memphis & C. R. R. Co., decided by the Supreme Court of Alabama in June, 1895 (18 S. R. 166), it appeared that at a station platform on defendant's road one of defendant's servants, while engaged in a playful scuffle, was unintentionally pushed against plaintiff, who had purchased a ticket and was preparing to go upon the train, thereby causing plaintiff to fall from the platform and sustain injuries. It was held that the conduct of defendant's employees was not fairly incident to their employment, and defendant was therefore not liable.

[3] As where a railway conductor kissed a female passenger against her will. Croaker v. Chicago, etc., Ry. Co., 36 Wis. 657; 17 Am. Rep. 504. Or where a passenger accused a brakeman of having stolen his watch, and the brakeman thereupon assaulted him. Chicago, etc., R. Co. v. Flexman, 103 Ill. 546; 42 Am. Rep. 33. Or where a brakeman in washing out a can purposely directed a jet of water on a passenger. Terre Haute, etc., R. Co. v. Jackson, 81 Ind. 19. And where a ticket agent wrongfully accused an intending passenger with having given him counterfeit money for his fare. Palmeri v Manhattan Ry. Co., *supra*. And where the engineer struck and cursed a passenger. White v. Norfolk & S. R. Co., 115 N. C. 631; 44 Am. St. Rep. 489. A very amusing application of this doctrine is found in Duffie v. Mathewson, 1 City Hall Recorder, 167, where it was held that "the captain and crew of a vessel on the

This duty extends to the protection of the passenger against other passengers and third persons, so far as practicable and foreseen.[1] This includes assaults, insults, thefts,

high seas have no right to permit or excite old Neptune to shave a passenger and immerse him in a tub of water, contrary to his will." This was in pursuance of the nautical custom towards landsmen who refuse, on coming in sight of the banks of Newfoundland, "to produce a bottle of old cogniac or rum as an acceptable sacrifice to Neptune." The same custom prevails on crossing the equator. The case is reported in an amusing mock-heroic and classical strain. For being compelled to be shaved with an iron hoop, and then submerged in a tub of water, the jury awarded $46 damages. On the other hand, the carrier has been held not responsible where a railway ticket agent had a passenger wrongfully arrested for giving him counterfeit money for his fare when the agent supposed it was counterfeit before he took it. See Mulligan v. N. Y. Cent. R. Co., *supra*. And where a conductor stopped his train, entered the plaintiff's premises, and seized and carried off on the train his minor son. Gilliam v. So. R. Co., 70 Ala. 268. And where a street car driver followed a passenger from a car and assaulted him. Cent. Ry. Co. v. Peacock, 69 Md. 257. And where a conductor shot a passenger under the erroneous impression, warranted by his attitude, manner and conduct, that he was about to draw a deadly weapon on him. Railroad Co. v. Jopes, 142 U. S. 18. And where a conductor followed a passenger and wrongfully procured his arrest for having given him counterfeit money for his fare. Galveston, etc., R. Co. v. Donahoe, 56 Tex. 162; Charleston v. London, etc., Ry. Co., Q. B. Div., 37 Alb. L. J., 102. The test is not whether the act was done according to the carrier's instructions, but whether it was done in the prosecution of the business given the servant to do. King v. N. Y. Cent. R. Co., 66 N. Y. 181; 23 Am. Rep. 37.

[1] Gillingham v. Ohio R. R. Co., *supra;* Illinois Cent. R. Co. v. Minor, 69 Miss. 710; 16 L. R. A. 627; Richmond & D. R. Co. v. Jefferson, 89 Ga. 554; 32 Am. St. Rep. 87; 17 L. R. A. 551; Pittsburgh, etc. R. Co. v. Pillow, 76 Pa. St. 510; 18 Am. Rep. 424; Putnam v. Broadway, etc., R. Co., 55 N. Y. 108; 14 Am. Rep. 190; Britton v. Atlanta, etc., Ry. Co., 88 N. C. 536; 43 Am. Rep. 749; Sira v. Wabash R. Co., 115 Mo. 127; 37 Am. St. Rep. 386. See note, 6 Am. St. Rep. 735. In Cobb v. Gt. W. R. Co., 1894, App. Cas. 419, the passenger was robbed by a gang of men who entered the train at a way-station. He complained to the station-master, informing him that the robbers were then on the train, and asked to have the train delayed to give an opportunity to have them arrested and searched by police then at the station, but he refused and started the train, whereby the passenger

robberies, and even loss by gambling.[1] But the carrier will not be thus responsible for robbery by strangers of an extraordinary sum of money.[2]

Nor does it extend to mere acts of negligence by one passenger toward another without fault of the carrier,[3] nor to malicious acts of strangers outside, without his negligence.[4]

The carrier is bound to afford the passenger safe and reasonable opportunity for obtaining food on long routes, and is liable for negligence injurious to the passenger who has left the train temporarily for that purpose.[5] He is also similarly liable where the passenger has temporarily left, or attempted to leave, the vehicle for business or curiosity.[6] But he is not bound to afford opportunity to leave the train at intermediate stations except for refreshment,[7] and if he so leaves the train, the carrier, although bound to notify him of the starting again if he is at hand,

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lost the money. He also complained that the company permitted the train to be over-crowded so that he was hustled and the more easily robbed. The House of Lords held that there appeared to be no breach of duty and no cause of action, steering clear of Pounder v. N. E. Ry. Co., 1892, 1 Q. B. 385, a case of overcrowding in transit, known to the carrier's servants.

[1] Smith v. Wilson, 31 How. Pr. 272.

[2] Weeks v. N. Y., etc., R. Co., 72 N. Y. 50; 28 Am. Rep. 104, where $16,000 was robbed by strangers while the car was being slowly drawn by horses through the streets of New York.

[3] Graeff v. Phila., etc., R. Co., 161 Pa. St. 230; 23 L. R. A. 606, where one hurrying to take a train opened a door violently against another.

[4] East Tenn., etc., R. Co. v. Kane, 92 Ga. 187; 22 L. R. A. 315, where a discharged employee misplaced a switch; Fredericks v. North. C. R. Co., 157 Pa. St. 103, where a stranger set cars loose on a down-grade switch, causing a collision.

[5] Peniston v. Chic., etc. R. Co., 34 La. Ann. 777; 44 Am. Rep. 444.

[6] Dice v. Willamette, etc., Co., 8 Oreg. 60; 34 Am. Rep. 575.

[7] Missouri P. Ry. Co. v. Foreman, 73 Tex. 311; 15 Am. St. Rep. 785.

is not bound to search for or wait for him if he is not.[1]

The carrier is bound to attend to the comfort of his vehicles, and if a passenger is injured in endeavoring to perform this omitted duty for himself, the carrier is liable.[2]

The transit being completed the carrier is bound to the highest care and skill in enabling the passenger to leave the vehicle and his premises. But the carrier is not bound by the conductor's promise to wake a sick and drowsy passenger on nearing his destination.[3] He must not stop short of nor overshoot a station or a platform.[4] He must stop at a platform or something equivalent, and not compel the passenger to make his way over tracks.[5] His platforms, bridges, etc., must be well constructed, adapted to the vehicles, and safe.[6]

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[1] DeKay v. Chic., etc., Ry. Co., 41 Minn. 178; 16 Am. St Rep. 687

[2] Western R. Co. v Stanley, 61 Md 266; 48 Am. Rep. 96 (shutting a door while going through a tunnel, to keep out smoke and cinders).

[3] Sevier v. Vicksburg, etc., R. Co., 61 Miss. 8; 48 Am. Rep. 74; Missouri, etc., Ry. Co v. Kendrick, — Tex. Civ. App. —; 32 S. W. Rep 42.

[4] Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699, N. Y., etc., R. Co. v Doane, 115 Ind 435; 1 L. R. A. 157, Thompson v. N. O., etc., R. Co., 50 Miss. 315; 19 Am. Rep. 12; Memphis & Little Rock Ry. Co. v. Stringfellow, 44 Ark. 322; 51 Am. Rep. 598; Cartwright v. Chicago, etc., Ry. Co., 52 Mich. 606; 50 Am. Rep. 274, and note, 277, Taber v. Del., etc., R. Co., 71 N. Y. 489.

[5] Missouri P R. Co v. Wortham, 73 Tex. 25; 3 L. R. A. 368; Phil., etc., R. Co. v. Anderson, 72 Md. 519; 20 Am. St. Rep. 483; 8 L. R. A. 673; Atchison, etc., R. Co v Shean, 18 Colo. 368, 20 L. R. A. 729. A passenger on a railroad train, with a ticket for a station at which it is customary for the train not to stop, but to slow its movement so as to allow passengers to alight, will be entitled to damages if, called to the platform by the announcement of the station, he is thrown from the steps of the car and injured, his fall being caused by the sudden increase of the speed of the train when it should have been slowed or stopped. Brashear v. Houston C. A. & N. R. Co, 28 L R A. 811, 47 La. Ann. 735; 17 So. Rep. 260.

[6] Turner v. Vicksburgh, etc., R. Co, 37 La. Ann. 648, 55 Am. Rep. 514; Johns v. Charlotte, etc., R. Co., 39 S. C. 162; 20 L R. A. 520; 39 Am. St.

His wharf must be safely accessible, and his station must be light.[1]

He is bound to the utmost degree of skill, care and diligence in affording egress. The passenger must be allowed a sufficient time to leave the vehicle.[2]

The carrier's duty sometimes extends to approaches which are not on his own premises, such as an elevated structure on an unopened street, or an alley connecting with a street.[3]

But a street railway carrier owes no duty to the passenger after he has left the car and until he reaches the sidewalk.[4]

Rep. 709. The carrier is liable for injury to a passenger on a platform by a mail bag thrown by a mail agent. Sargent v. St. Louis, etc., R. Co., 114 Mo. 348; 19 L. R. A. 460.

[1] Phila., etc., R. Co Anderson, 72 Md. 519; 20 Am. St. Rep. 483; 8 L R. A. 673; Penn. Co. v. Marion, 123 Ind. 415; 7 L. R. A. 687; 18 Am. St. Rep. 330; Stewart v. Internat., etc., R. Co., 53 Tex. 289; 37 Am. Rep. 753; Eagle Packet Co. v. De Fries, 94 Ill. 598; 34 Am. Rep. 245, Dice v. Willamette, etc., Co., *supra*. A ferry boat must be brought close up to the landing at all points, or a guard must be stationed to warn passengers of the gap. Drake v. Dartmouth, 25 N. S. 177. A railroad company is liable for an injury to an infirm passenger whose condition was known to the conductor, caused by failure to provide suitable means for alighting from the train. Madden v. Port Royal & W. C. R. Co. (S. C.), 19 S. E 951. In short, like a good actor, he must observe his "exits and his entrances." But he is not always bound to free steps from ice or scatter ashes or sawdust on them. Kelly v Manhattan R. Co., 112 N. Y. 443; 3 L. R. A 74. See note, 6 L. R A 193.

[2] Chicago & A. R. Co. v Arnol, 144 Ill. 261; 19 L. R. A 313, Texas, etc., R. Co. v. Miller, 79 Tex 78; 23 Am. St. Rep. 308; Highland Av & B. R. Co. v. Burt, 92 Ala 291; 13 L. R. A. 95. So on a pay-car N Y., etc, R. Co. v. Coulbourn, 69 Md. 360; 1 L R. A. 541.

[3] Delaware, etc., R. Co. v. Trautwein, 52 N. J L. 169; 7 L R. A. 435, 19 Am St. Rep 442; Skottowe v. Oregon, etc., R. Co., 22 Oreg. 430, 16 L. R. A. 593.

[4] Creamer v West End S R. Co., 156 Mass. 320; 16 L. R. A. 490; 32 Am. St Rep. 456, Putnam v Broadway, etc., R. Co, 55 N. Y. 108; 14 Am. Rep. 190.

CHAPTER XX.

CARRIERS OF PASSENGERS—DUTY AND LIABILITY OF THE PASSENGER.

The primary duties of the passenger are to pay his fare, procure, produce and surrender his ticket as and when required, and conduct himself in an orderly and careful manner.

As has been shown, he must procure his ticket, if required, before boarding the carriage [1] He may be required to exhibit it before boarding the carriage.[2] He must also exhibit it on the demand of the conductor during the journey, whenever required,[3] but he should be allowed a reasonable time to find and produce it,[4] or borrow the money for his fare,[5] and if he ignorantly tenders a tax certificate for his fare and another offers to pay it, he is entitled to be carried.[6] He is not responsible for the mistake of the carrier's conductor in respect to his ticket,[7] but

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[1] *Ante*, p 166; Poole v. N. P. R. Co., 16 Oreg. 261; 8 Am. St. Rep 289.

[2] *Ibid.;* Pittsburgh, etc., Ry. Co. v. Vandyne, 57 Ind 576; 26 Am. Rep. 68; North. C. Ry Co v O'Conner, 76 Md. 207, 35 Am. St. Rep. 422.

[3] Poole v. N. P R Co., *supra;* Downs v. N. Y., etc., R. Co., 36 Conn. 287; 4 Am. Rep. 77 (commuter who had left his ticket at home); Jerome v Smith, 48 Vt. 230; 21 Am. Rep. 125 (lost ticket), Bradshaw v S. B R Co., 135 Mass. 407, 46 Am. Rep. 481 (conductor of street car giving wrong transfer ticket).

[4] Maples v. N Y., etc., R. Co, 38 Conn. 557, 9 Am. Rep. 434; International, etc., R. Co. v. Wilkes, 68 Tex. 617, 2 Am St. Rep. 515.

[5] Clark v. Wilmington, etc., R. Co, 91 N. C. 506; 49 Am. Rep 647.

[6] Louisville, etc., R. Co. v Garrett, 8 Lea, 438, 41 Am. Rep. 640.

[7] Georgia, etc., R. Co. v. Eskew, 86 Ga. 641; 22 Am. St. Rep. 490; Kansas C., etc., Ry. Co. v. Riley, 68 Miss. 765; 24 Am. St. Rep. 309; 13 L. R. A. 38 (conductor returning wrong end of round trip ticket); Lake Erie, etc., Ry. Co.

this does not excuse him from producing a proper ticket to a succeeding conductor, in order to be entitled to pursue his journey, although he may recover damages for the first conductor's mistake.[1]

If the ticket is insufficient through the fault or mistake of the carrier's ticket-seller, the carrier is responsible.[2]

If the passenger produces and surrenders an insufficient ticket it must be returned to him before fare can be exacted,[3] and if he pays insufficient fare it must be returned to him after deducting fare to the point of expulsion.[4] The conductor may not seize articles of property in the possession of the passenger for his unpaid fare.[5]

The passenger must inform himself of the carrier's regulations as to trains and stops.

If, without direction from the carrier, and ignorantly, he takes a wrong train, or one that does not stop at his

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v. Fix, 88 Ind. 381; 45 Am. Rep. 464. But if he receives a regular ticket on surrender of a special train ticket, this gives him no right except on the special train. McRae v. Wilmington, etc., R. Co., 88 N. C. 526; 43 Am. Rep. 745.

[1] Yorton v. Milwaukee, etc., Ry. Co., 54 Wis. 234; 41 Am. Rep. 23 (conductor giving trip check instead of stop-over ticket); Townsend v. N. Y. Cent., etc., R. Co., 56 N. Y. 295; 15 Am. Rep. 419 (ticket surrendered to previous conductor); Shelton v. Ry. Co., 29 Ohio St. 214; McClure v. Phila., etc., R. Co., 34 Md. 532; 6 Am. Rep. 345 (conductor's trip check pronounced good for subsequent day); Penn. R. Co. v. Connell, 112 Ill. 295; 54 Am. Rep. 238 (ticket issued by unauthorized agent); Lake Shore, etc., Ry. Co. v. Pierce, 47 Mich. 277; Haggerty v. Flint, etc., R. Co., 59 Mich. 366; 60 Am. Rep. 301 (conductor's check offered on a succeeding connecting line). But compare Burnham v. Gd. T. Ry. Co., 63 Me. 298; 18 Am. Rep. 220.

[2] As where a purchased ticket is sold as valid, and the passenger is expelled. Murdock v. B. & A. R. Co., 137 Mass. 293; 50 Am. Rep. 307. See Head v. Geo., etc, Ry. Co., 79 Ga. 358; 11 Am. St. Rep. 434.

[3] Post v. Chic. & N. W. R. Co., 14 Neb. 110; 45 Am. Rep. 100; Van Kirk v. Penn. R. Co., 76 Pa. St. 66; 18 Am. Rep 404.

[4] Bland v. So. P. R. Co., 55 Cal 570; 36 Am. Rep. 50; *Contra:* Hoffbauer v. Delhi, etc., R. Co., 52 Ia. 342; 35 Am. Rep. 278; Wardwell v. Chic., etc., R. Co., 46 Minn. 514; 24 Am. St. Rep. 246.

[5] Ram den v. B. & A. R. Co., 104 Mass. 117; 6 Am. Rep. 200.

station, he cannot demand that it shall stop,[1] but he may not be immediately expelled,[2] and is entitled to ride to an intermediate stopping place.[3]

But if the passenger in taking the train follows the direction of the carrier's servants the carrier is responsible.[4]

The carrier may eject the passenger for failure to produce and surrender a proper ticket or pay his fare.[1] In the absence of statutory regulation he is not bound to do this at a station,[5] but it must be done at a proper and safe place, without unnecessary force, and without insult or indignity, and with proper regard to the passenger's sex and condition, and if the ejection is not thus made the carrier may be rendered liable in damages.[6]

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[1] Pittsburgh, etc., Ry. Co. v. Nuzum, 50 Ind. 141; 19 Am. Rep. 703; Interna'l G. N. Ry. Co. v. Hassell, 62 Tex. 256; 50 Am. Rep. 525; Atchison, etc., R. Co. v. Gants, 38 Kans. 608; 5 Am. St. Rep. 780.

[2] Maroney v. Old Col., etc., Ry. Co., 106 Mass. 153; 8 Am. Rep. 305.

[3] Richmond, etc., R. Co. v. Ashby, 79 Va. 130; 52 Am. Rep. 620.

[4] South., etc., R. Co. v. Huffman, 76 Ala. 492; 52 Am. Rep. 349.

[5] McClure v. Phil., etc., R. Co., 34 Md. 532; 6 Am. Rep. 345; Atchison, etc., R. Co. v. Gants, 38 Kans. 608; 5 Am. St. Rep. 780. Some of the cases make a distinction between persons having color of right on a train and bare trespassers, holding that the latter may be ejected at any safe place, but the former only at a station. Hardenbergh v. St. Paul, etc., Ry. Co., 39 Minn. 3; 12 Am. St. Rep. 610.

[6] *Ibid.;* Higgins v. Watervliet T. Co., 46 N. Y. 23; 7 Am. Rep. 293; Phil., etc., R. Co. v. Larkin, 47 Md. 155; 28 Am. Rep. 442, and cases cited in note; Arnold v. Penn. R. Co., 115 Pa. St. 135; 2 Am. St. Rep. 542; Memphis & Charleston R. Co. v. Benson, 85 Tenn. 627; 4 Am. St. Rep. 776; North. Chic. C. R. Co. v. Gastka, 128 Ill. 613; 4 L. R. A. 481; Burch v. Balt., etc., R. Co., — D. C. —; 26 L. R. A. 129, with notes. Ejection from a slowly moving train is not necessarily negligent. South. K. R. Co. v. Sanford, 45 Kans. 372; 11 L. R. A. 432. A young child, although a trespasser, may not be put on at a distant station without attendance or instructions. Indianapolis, etc., Ry. Co. v. Pitzer, 109 Ind. 179; 58 Am. Rep. 387.

"A conductor has the right under proper circumstances, to eject a passenger from a car; but he would not be justified in exercising that right while the car was at a high rate of speed, or when upon a high trestle, nor would he be justi-

If the passenger is lawfully on the train and has paid his fare he may resist ejection to such an extent that extraordinary force is necessary for his removal, and he may recover damages for injury in consequence.[1] But he may not recover exemplary damages where he was inviting ejection by riding simply to test a question of the carrier's right to fare.[2]

On arrival at his destination, if his ticket has not been surrendered, and he alleges that he has lost it, the carrier may detain him a reasonable length of time for investigation before allowing him to leave the boat or station.[3] Although the carrier has no implied right to detain the passenger's person for his fare, yet an agreement between the master of a vessel and a passenger, made at the time of taking passage, that the passenger shall remain on board until he has paid his passage-money, is lawful.[4]

Where the passenger has incurred the liability to expulsion for the non-production of a proper ticket or non-pay-

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fied in putting off a person who was blind or deaf, knowing his infirmity, except at a safe place. Upon like principles, the law would not justify a conductor in putting off a passenger at a time and place, and under conditions and circumstances which would expose him unnecessarily to great peril of life or bodily harm; and this, too, whether the danger arose from the natural infirmity of the person, or was self-imposed. If the conductor did not know of the infirmity of the person and the peril attending the ejection, there would be no liability arising from the exercise of the right and performance of the duty. It is the fact of notice or knowledge of the danger on the part of the conductor under such circumstances, that constitutes the act culpable or willful." (Alabama) Johnson v. Louisville & N. R. Co., 16 So. Rep. 75. See cases, *ante*, p 178.

[1] English v. Del., etc., Co., 66 N. Y. 454; 23 Am. Rep. 69. The contrary seems to be intimated in Atchison, etc., R. Co. v. Gants, 38 Kans. 608; 5 Am. St. Rep. 780; Peabody v. Oregon, etc., Co., 21 Oreg. 121; 12 L. R. A. 823, which hold that the passenger should pay his fare or quietly leave the train when required, and resort to his action.

[2] Cincinnati, etc., R. Co. v. Cole, 29 Ohio St. 126; 23 Am. Rep. 729.

[3] Standish v. N. St. Co., 111 Mass. 512; 15 Am. Rep. 66.

[4] Com. v. Schultz (Penn.), 3 Wheel. Cr. Cas. 322.

ment of fare, the question whether he may reinstate himself by an offer to pay fare on the production of a proper ticket is variously decided. The better opinion seems to be that his *locus penitentiæ* extends only up to the point of the stopping of the train for the purpose of putting him off, and that after that he cannot entitle himself to resume his journey on the same train.[1]

Contributory negligence.—The passenger is bound to exercise reasonable prudence in the care of his own person. But this is measured by his physical and mental capacity. If for example, a carrier receives a blind passenger unattended, he may not claim that he should exercise the activity of one who has his sight in endeavoring to escape an accident.[2]

To board or leave a steam railway train in motion is usually regarded as negligent,[3] although it is not neces-

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[1] Swan v. Manchester, etc., R., 132 Mass. 116; 42 Am. Rep. 432; Hoffbauer v. Delhi, etc., R. Co., 52 Ia. 342; 35 Am. Rep. 278; Pease v. Del., etc., R. Co., 101 N. Y. 367; 54 Am. Rep 699; Georgia, etc., R. Co. v. Asmore, 88 Ga. 529; 16 L. R. A. 53. In Bland v. So. P. R. Co., 55 Cal. 570; 36 Am. Rep. 50, the passenger was deemed entitled to avoid expulsion, even after stopping, by tendering the balance of his fare. In O'Brien v. N. Y. Cent., etc., R. Co., 80 N. Y. 236, it was held that where a stop is made for the express purpose of putting the passenger off, he cannot insist on being permitted to resume his trip by an offer to pay the disputed fare; but where the stop is at a regular station, if before ejection he or others for him offer the full fare, the conductor is bound to accept it. In Tex., etc., Ry. Co. v. Bond, 62 Tex. 442; 50 Am. Rep. 532, a passenger offered the conductor the amount which he had been accustomed to pay, but the conductor demanded an additional sum because he had no ticket, which being refused, he stopped the train, and although the passenger then offered the additional sum, ejected him. Held, unlawful, unless the passenger's conduct was willful. But at all events there must be a tender or offer; mere willingness will not suffice. Texas, etc., R. Co. v. James, 82 Tex. 306; 15 L. R. A. 347.

[2] Railroad Co. v. Maddry, 57 Ark. 306.

[3] Ill. Cent. R. Co. v. Slatton, 54 Ill. 133; 5 Am. Rep. 109; Cent. R. & B. Co. v. Letcher, 69 Ala. 106; 44 Am. Rep. 505; Jewell Chic., etc., Ry. Co.,

sarily so in respect to a street railway car,[1] and sometimes in regard to slowly moving steam cars it is regarded as a question of fact.[2] The passenger however may be excused if he acts by the direction or encouragement of the carrier's agents.[3] And so, if in the face of sudden peril and to avoid imminent injury he leaps from the train, although he would not have been hurt had he remained on board.[4]

It is the duty of the passenger to enter a part of the train designed for passengers. Ordinarily he is not warranted in getting on the engine, or in a baggage car or on top of a car, provided it conduces to the injury, although as to riding in a baggage car the case may be different if

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54 Wis. 610; 41 Am. Rep. 63; Solomon v. Manhattan Ry. Co., 103 N. Y. 437, 57 Am. Rep. 760, note; Houston, etc., Ry. Co. v Leslie, 57 Tex. 83; Merrill v. East. R. Co., 139 Mass. 238; 52 Am. Rep. 705; Com. v. B. & M. R., 129 Mass. 500; 37 Am. Rep. 382.

[1] Eppendorf v. Brooklyn, etc., R. Co., 69 N. Y. 195, 25 Am. Rep. 171; Connor v. Citizen St. Ry. Co., 105 Ind. 62, 55 Am. Rep. 177.

[2] Tex., etc., Ry. Co. v. Murphy, 46 Tex. 356; 26 Am. Rep. 272; Doss v. M., etc., R. Co., 59 Mo. 27; 21 Am. Rep. 371, and cases note, 37 Am. Rep. 384.

[3] St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 519; 40 Am. Rep. 105, Chic., etc., R. Co. v. Randolph, 53 Ill. 510; 5 Am. Rep. 60; Lambeth v. N. C. R. Co., 66 M. C. 494; 8 Am. Rep. 508; Filer v. N. Y. C. R. Co., 49 N. Y. 47; 10 Am. Rep. 327; Georgia R. Co. v. McCurdy, 45 Ga. 288; 12 Am. Rep. 577, and cases in note, 37 Am. Rep. 385; Irish v. No. Pac. R. Co., 4 Wash. 48, 31 Am. St. Rep. 899. But the mere opinion of the conductor that it was safe, would not justify jumping off a train moving six to twelve miles an hour. Bardwell v. Mobile & O. R. Co., 63 Miss. 574; 56 Am. Rep. 842.

[4] Twomley v. Cent. P., etc., R. Co., 69 N. Y. 158; 25 Am. Rep. 162; Wilson v. North P. R. Co., 23 Mich. 278; 37 Am. Rep. 410; Iron Ry. Co. v. Mowery, 36 Ohio St. 418; 38 Am. Rep. 597, and note, 599. It is a question of fact. Woolery v. Louisville, etc., Ry. Co., 107 Ind. 381; 57 Am. Rep. 114; St. Louis, etc., Ry. Co. v. Murray, 55 Ark. 248; 29 Am. St. Rep. 32. The same is true where the passenger goes out on the platform of the car to avoid an apparent peril. Mitchell v. So. P. R. Co., 87 Cal. 62; 11 L. R. A. 130. And so where in terror from an assault by the conductor he jumps from the train. Texas, etc., R. Co. v. Williams, 62 Fed. Rep. 440.

it was by permission of the carrier's servants, and without knowledge by the passenger that it was against the rules.[1]

It is manifestly dangerous for the passenger to ride on the platform of a swiftly moving steam railway train,[2] but not so of the platform or sideboards of a crowded street car.[3] In respect to steam cars it is not necessarily negligent for the passenger to ride upon the platform if there is no room inside, for if it is the duty of the passenger to avoid a crowded train, it is also the duty of the carrier to prevent him from getting on such a train, and if he is per-

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[1] Merrill v. East. R. Co., 139 Mass 238; 52 Am. Rep 705, Jacobus v St. P., etc., Ry. Co., 20 Minn. 125; 18 Am. Rep. 360; Kentucky, etc., R. Co. v. Thomas' Adm'r, 79 Ky. 160; 42 Am. Rep. 208; Houston, etc., R. Co. v Clemmons, 55 Tex. 88; 40 Am. Rep 799; Penn. R Co. v. Langdon, 92 Pa. St. 21; 37 Am Rep. 651; Little Rock, etc., Ry. v. Miles, 48 Am Rep 10. It is not necessarily negligent for a member of a theatrical company to ride in the show car Blake v. Burlington, etc., R. Co., 89 Iowa, 8, 21 L. R. A. 559. See *ante*, p. — , as to effect of consent of servants. Also, Balt., etc., R. Co. v. State, 72 Md. 36, 6 L. R. A. 706, 20 Am St. Rep. 454; Wagner v. Mo P. R. Co., 97 Mo. 512; 3 L. R. A. 156, Meloy v. Chicago, etc., R. Co., 77 Iowa, 743; 4 L. R. A. 287; 14 Am St Rep. 325.

[2] Camden, etc., R. Co v Hoosey, 99 Pa. St. 492, 44 Am. Rep. 120, Graville v. Manhattan R. Co., 105 N. Y 525; 59 Am. Rep 516, Worthington v Cent. Vt. R. Co., 64 Vt 107, 15 L. R. A. 326, Quinn v Ill. Cent. R. Co., 51 Ill. 495.

[3] Thirteenth, etc., Ry. Co v Boudrou, 92 Pa. St. 475; 37 Am. Rep 707; Germantown, etc., Ry. Co. v. Walling, 97 Pa. St. 55; 39 Am. Rep. 796; Nolan v. Brooklyn, etc., R. Co., 87 N. Y. 63, 41 Am. Rep 345, Spooner v. Brooklyn C. R. Co., 54 N. Y. 230; 13 Am. Rep. 570, Upham v. Detroit, etc., R. Co., 85 Mich. 12, 12 L. R. A. 129; Hawkins v. Front St. C. R. Co., 3 Wash. 592; 16 L R. A. 808; Highland Av. & B. R. Co. v. Donovan, 94 Ala. 299; Elliott v. Newport S. R. Co., — R. I. —; 23 L. R. A. 208; although it has been considered otherwise if there is standing room inside, with straps for support. Andrews v. Capitol, etc., R. Co., 2 Mackey, 137, 47 Am. Rep. 266. It is not necessarily negligent for the passenger to walk from one car to another of a moving train, to find a seat, although he is hurt while on the platform. Dewire v. Boston, etc, R Co., 148 Mass. 443; 2 L. R. A 166, Colegrove v. N. Y., etc., R. Co., 20 N. Y. 492, 75 Am. Dec. 418.

mitted on it, the carrier should be held responsible for injuries arising from his dangerous position.[1]

The passenger is bound to reasonable care in alighting from the cars, should await directions, and should not alight unauthorized in an unaccustomed or dangerous place.[2] But it is not necessarily negligent to make preparations to alight before the train has stopped, as by getting up and going forward.[3] He may even stand up to look at the landscape.[4] But he may not repeatedly leave his seat to close an insecure door.[5] It is not necessarily negligent to stand near the bow of a ferry-boat while landing.[6]

Upon the question of the passenger's negligence in exposing any part of his person outside the car window when the train is in motion, there is a great and irreconcilable conflict of decision. Some cases hold it conclusively neg-

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[1] Lafayette & I. R Co. v. Sims, 27 Ind. 59; Werle v. L. I. R. Co., 98 N. Y. 650; Willis v L. 1. R. Co., 34 N. Y., 670; and so the right to stand on the platform exists where a passenger, with an excursion ticket, on the return of the train is unable to find room inside, and is not informed that he can be carried on another train. Lynn v. So Pac. R. Co., 103 Cal 7; 24 L. R A. 710.

[2] Mitchell v. Chic & G. T. Ry. Co., 51 Mich. 236; 47 Am. Rep. 566, Ill. Cent. R. Co. v. Green, 81 Ill. 19; 25 Am. Rep. 255, Terre Haute, etc., R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168; Taber v. Del etc., R Co., 71 N. Y. 489. One ejected at one end of a trestle, crossing the trestle to get his gun from the baggage car at the other end, and injured, was held negligent I. & G. N. Ry. Co. v. Folliard, 66 Tex. 603, 59 Am. Rep. 632

[3] Worthen v Grand T. Ry Co, 125 Mass. 99, Wylde v. North R. Co, 53 N. Y. 156, Pres't, etc v. Leonhardt, 66 Md 70, and cases in note, 58 Am. Rep. 113. But not so of a passenger in a caboose on a freight train. Harris v. Hannibal, etc., R. Co., 89 Mo. 233

[4] Gee v. Met. Ry. Co., L. R, 8 Q. B 161.

[5] Adams v. Lancashire Ry. Co, L R, 4 C. P 739. Compare, West Md. Ry. Co. v. Stanley, 61 Md. 266, 48 Am. Rep 96

[6] Peverly v. City of Boston, 136 Mass. 366, 49 Am. Rep 37. The passenger is justified in going out on the platform at the invitation of a brakeman, for the purpose of alighting, although not at the station, and against the rules. Balt. etc., R. Co. v. Meyers, 62 Fed. Rep 367.

ligent;[1] others hold it a question of fact.[2] Where the law of comparative negligence prevails it is measured with the defendant's negligence.[3] But it is not negligent for him to lay his arm on the window sill, although it is thrown outside by a jar and injured.[4]

One fraudulently using another's ticket cannot recover for injury,[5] and so if he fraudulently induces the servants of the carrier to allow him to ride free.[6] "The rule is well settled that where one gets on a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or if being on the train, and having money with him with which he could pay his fare, he falsely and fraudulently represents to the conductor that he is without means to pay his fare, and by means of such false representations induces the conductor to permit him to remain on the train without paying his fare, the relation of carrier and passenger and the obligations resulting from that relation are not thereby established between him and the company, and the company owes him no other duty than not to willfully or recklessly injure him."[7]

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[1] Pittsburgh, etc., R. Co. v. Andrews, 39 Md. 329; 17 Am. Rep. 568; Dun v. Seaboard, etc., R. Co., 78 Va. 645; 49 Am. Rep. 388; Holbrook v. Utica, etc., R. Co., 12 N. Y., 236; Richmond & D. R. Co. v. Scott, 88 Va. 958; 16 L. R. A. 91.

[2] Barton v. St. Louis, etc., R. Co., 52 Mo. 253; 14 Am. Rep. 418, and note, 423; Summers v. Crescent, etc., R. Co., 34 La. Ann. 139; 44 Am. Rep. 419; Sanderson v. Frazier, 8 Colo. 79; 54 Am. Rep. 544; Dahlberg v. Minn. etc., Ry. Co., 32 Minn. 404; 50 Am. Rep. 585; Miller v. St. Louis R. Co., 5 Mo. App 471 (elbow out of street horse-car window).

[3] Chicago, etc., R. Co. v. Pondrom, 51 Ill. 333; 2 Am. Rep. 306.

[4] Germantown Pass. Co. v. Brophy, — Pa. St. —; Farlow v. Kelley, 108 U. S 288. See Moakler v. Portland & W. V. R. Co., 18 Oreg. 189; 6 L.R. A. 656.

[5] Way v. Chicago, etc., Ry. Co., 64 Iowa, 48; 52 Am. Rep. 431.

[6] Toledo, etc., Ry Co. v. Brooks, 81 Ill. 245; Rucker v. Mo. P. Ry. Co., 61 Tex. 499.

[7] Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 250; Chicago & A. R. Co. v. Michie, 83 Ill. 431; Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 84; 28 Am.

A passenger injured by the concurring negligence of his own carrier and another, is not chargeable with the negligence of the former.[1]

Rep. 613; Chicago, B. & Q. R. Co. v. Mehlsack, 131 Ill. 64; McVeety v. St. Paul, M. & M. R. Co., 45 Minn. 269; 11 L. R. A. 174; Robertson v. N. Y. & E. R. Co., 22 Barb. 91; Union Pac. R. Co. v. Nichols, 8 Kan. 505; 12 Am. Rep. 475; Prince v. International & G. N. R. Co., 64 Tex. 146; Gulf. C. & S. F. R. Co. v. Campbell, 76 Tex. 175; Way v. Chicago, R. I. & P. R. Co., 64 Iowa, 48; 73 Iowa, 463; Coudrau v. Chicago, etc., Ry. Co., 67 Fed. Rep., 522; 28 L. R. A. 749.

[1] N. Y., etc., R. Co. v. Steinbrenner, 47 N. J. L. 161; 54 Am. Rep. 126, and cases in note, 135; Little v. Hackett, 116 U. S. 366. The contrary doctrine of Thorogood v. Bryan, 8 C. B. 115, now discarded in England (The Bernina, L. R. 12 P. D. 58), never prevailed to much extent in this country. See Noyes v. Boscawen, 64 N. H. 361; 10 Am. St. Rep. 410; note, 57 Am. Rep. 488.

CHAPTER XXI.

CARRIERS OF PASSENGERS — BAGGAGE AND OTHER PROPERTY.

In consideration of the fare paid by the passenger, the carrier is bound to transport with him and safely deliver to him at his destination, his reasonable baggage, and for this his liability is like that of a carrier of goods, an insurer against loss or injury by any accident except by the act of God or the public enemy.[1] The liability attaches if it is accepted, although no fare has been paid,[2] but not where it was carried gratuitously,[3] nor where there was no accompanying passenger.[4]

Under the term baggage are included not only such articles as the passenger expects to need or use by the way, but such as passengers ordinarily carry, and it may embrace articles for the use of his family, but not those for third persons.[5] It includes articles of luxury as well as necessaries, and such as are proportioned to the means and station of the traveller and the length and character of his journey and his stay.[6]

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[1] Roth v. Buffalo, etc., R. Co., 34 N. Y. 548; 90 Am. Dec. 736; Oakes v. North. P. R. Co., 20 Oreg. 392, 12 L. R. A. 318; 23 Am. St. Rep. 126.

[2] McGill v. Rowand, 3 Pa. St. 451; 45 Am. Dec. 654, and before purchase of ticket, Lake Shore, etc., Ry. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 319.

[3] Flint, etc., R. Co. v. Wier, 37 Mich. 111; 26 Am. Rep. 499.

[4] Wilson v. G. T. Ry. Co., 56 Me. 60; 96 Am. Dec. 435; but the passenger need not go on the same train, Curtis v. Del., etc., R. Co., 74 N. Y. 116; 30 Am. Rep. 271.

[5] Dexter v. Syracuse, etc., R. Co., 42 N. Y. 326; 1 Am. Rep. 527

[6] The following articles have been deemed baggage: an opera glass, Toledo, etc., R. Co. v. Hammond, 33 Ind. 379; 5 Am. Rep. 221; a commercial traveller's price-book, Gleason v. Goodrich Trans. Co., 32 Wis. 85; 14 Am. Rep. 716,

The carrier is not responsibie for merchandise carried for sale or as samples, unless he knows the character thereof and assents to the carriage of it as baggage.[1] But if he is informed of its character, and is paid extra compensation for carrying it, he becomes responsible for it.[2]

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a gold watch in a trunk, Am. Cont. Co. v. Cross, 8 Bush, 472; 8 Am Rep. 471; a watchmaker's tools, Kansas City, etc., R. Co. v. Morrison, 34 Kans. 502; 55 Am. Rep. 252; valuable laces, N. Y., etc., R. Co. v. Fraloff, 100 U. S. 24; bed and bedding of a poor man moving with his family, Ouimit v Henshaw, 35 Vt. 605; 84 Am. Dec. 646; beds, bedding, silver spoons, and a gun, Parmelee v. Fischer, 22 Ill. 212; a reasonable amount of money for travelling expenses in a trunk, Jordan v. Fall River R. Co., 5 Cush. 69; 51 Am. Dec. 44, Ill. Cent. R. Co. v. Copeland, 24 Ill. 332; 76 Am. Dec 749; duelling pistols (for the passenger's "satisfaction"), Woods v. Devin, 13 Ill. 747; 56 Am. Dec. 483; a revolver, Davis v. Mich., etc., R. Co., 22 Ill. 278; 74 Am. Dec. 151, a dentist's instruments, Brock v. Gale, 14 Fla. 523; 14 Am. Rep. 356; a travelling salesman's catalogue, Staub v. Kendrick, 121 Ind. 226; 6 L. R. A. 619; a dog, Kansas City, etc., R. Co. v. Higdon, 94 Ala. 286, 14 L. R. A. 515; 33 Am St. Rep. 119; watch, chain and diamond pin in trunk, Coward v. East T., etc., R. Co., 16 Lea, 225; 57 Am. Rep. 227; a servant's livery, Meux v. Gt. E. Ry. Co., Q. B., Oct., 1895.

The following have been held not to be baggage: a sacque, muff, and napkin-ring for a man (but why not the napkin-ring?), Chicago, etc., R. Co. v. Boyce, 73 Ill. 510; 24 Am. Rep. 268; a feather bed not intended for use on the voyage, Connolly v. Warren, 106 Mass. 146; 8 Am. Rep. 300, and note, 302, a large amount of gold coin of a county treasurer, Pfister v. Cent. P. R. Co., 70 Cal. 169; 59 Am. Rep. 404; stage properties, costumes and advertising matter, Oakes v. No. P. R. Co., 20 Oreg. 392; 23 Am. St. Rep. 126, 12 L. R. A. 318; a lady's jewelry for a man, Metz v. Cal. S. R. Co., 85 Cal. 329, 20 Am. St. Rep. 228; 9 L. R. A. 431; a dog, Honeyman v. Oregon, etc., R. Co., 13 Oreg. 352; 57 Am. Rep. 20. The cases of Ouimit v. Henshaw, and Parmalee v. Fischer, *supra*, extend the carrier's responsibility to an unprecedented and perhaps unreasonable extent.

[1] Mich. Cent. R. Co. v. Carrow, 73 Ill. 348; 24 Am. Rep. 248; Haines v. Chic., etc., R. Co., 29 Minn. 160; 43 Am. Rep. 199; Penn. Co. v. Miller, 35 Ohio St. 541; 35 Am. Rep. 620; Blumantle v. Fitchburg R. Co., 127 Mass. 322; 34 Am. Rep. 376; Alling v. B. & A. R. Co., 126 Mass. 121; 30 Am. Rep. 667.

[2] Hoeger v. Chicago, etc., Ry. Co., 63 Wis. 100; 53 Am. Rep. 271, Oakes v. N. P. R. Co., *supra*.

If the passenger has been accustomed to carry merchandise in his trunks, the carrier may decline to carry them without satisfactory proof of their contents.[1] No contract of responsibility arises upon acceptance merely from the appearance of the baggage, nor the carrier's knowledge of its character, nor because he accepted similar articles from others.[2]

If the passenger unnecessarily retains exclusive possession and control of personal articles on the journey, the carrier is absolved from responsibility for them unless negligent.[3] If the passenger fails to deposit his baggage, not needed for use on the journey, in a room provided by the carrier for the purpose to his knowledge, the carrier is not liable for its loss by theft except through his negligence.[4] But ordinarily the carrier by water is responsible for personal articles retained by the passenger and reasonably necessary for use on the journey, the assignment of a stateroom being deemed the designation of the place where the traveller may put his ordinary baggage.[5]

In regard to property of a passenger carried on a ferryboat and kept by him under his control, as where he undertakes to manage and control his horses without aid

[1] Norfolk, etc., R Co. v. Irvine, 85 Va 217; 1 L. R. A 110.

[2] Blumantle v. R. Co., *supra*, Alling v. R Co., *supra*.

[3] Tower v. Utica, etc., R. Co., 7 Hill, 47; 42 Am. Dec 36 (coat left in a coach and stolen), Steamboat Cr. Palace v. Vanderpool, 16 B. Monr. 302 (coat retained by passenger and stolen); The R. E. Lee, 2 Abb. U. S. 49 (jewelry left in satchel in stateroom and stolen while owner was at meal); Clark v. Burns, 118 Mass. 275; 19 Am. Rep. 456 (watch stolen from coat or from under pillow); Cohen v. Frost, 2 Duer, 335 (trunk fastened with ropes under steamer berth); Wright v. Caldwell, 3 Mich. 51 (trunk put in usual place but without notice thereof or of the intention to become passenger). But a carrier was held for a satchel containing wearing apparel and stolen from a locked stateroom, Macklin v. N. J. St. Co., 7 Abb. Pr [N. S] 229; and so for an overcoat thus left, Gore v. Norwich, etc., T. Co., 2 Daly, 254.

[4] Gleason v. Goodrich Tran. Co., 32 Wis. 85; 14 Am. Rep. 716.

[5] Hutch. Carr., § 700.

from the ferryman, the rule is that the ferryman is not under the obligation of a common carrier, but is bound only to reasonable care and diligence.[1]

But the carrier is liable for his own negligence even where the passenger assumes the control.[2]

Money kept on or about the person is ordinarily considered not to be baggage for a loss of which the carrier is responsible either in case of robbery or of destruction.[3]

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[1] In Wyckoff v. Queens Co. Ferry Co., 52 N. Y. 32; 11 Am. Rep. 650, where the blowing of the whistle startled the passenger's horse and he plunged off the boat and with the wagon was lost, this doctrine was applied on the authority of White v. Winnisimmet Co., 7 Cush. 155, disapproving Fisher v. Clisbee, 12 Ill 344; Powell v. Mills, 30 Miss. 231; Wilson v. Hamilton, 4 Ohio St. 722. The same doctrine is held in Harvey v. Rose, 26 Ark. 3; 7 Am. Rep. 595; and in Dudley v. Camden, etc, F. Co., 42 N. J. L. 25. Hutchinson approves this doctrine. Carriers, § 58, note 101.

[2] Bergheim v. Gt. E. Ry. Co., 3 C. P. Div. 221; 5 Eng. Rul. Cas. 464; Kinsley v. L. S., etc., Ry. Co., 125 Mass. 54; 28 Am. Rep. 200 (baggage in sleeping car); Morris v. Third Ave. R. Co., 23 How. Pr. Rep. 345; Am. St. Co. v. Bryan, 83 Pa. St. 446; Pullman Pal. Car. v. Pollock, 69 Tex. 120; 5 Am. St. Rep. 31, and note, 34. In McKee v. Owen, 15 Mich. 115, the court were equally divided in opinion as to the liability of a steamboat carrier, where a woman on going to bed at night rolled up her money in her gown and laid it in the upper berth, whence it was stolen through a broken window.

[3] Ill. Cent. R. Co. v. Handy, 63 Miss. 609; 56 Am. Rep. 846; First Nat. Bank v. Marietta, etc., R. Co., 20 Ohio St. 259; 5 Am. Rep. 655; Carpenter v. N. Y. etc., R. Co., 124 N. Y. 53; 21 Am. St. Rep. 644; 11 L. R. A. 759; (money under pillow in sleeping-car); Lewis v. N. Y. Cent. S. C. Co.; 143 Mass. 269; 58 Am. Rep. 135. But in Adams v. N. J. St. Co., 9 Misc. 25, the carrier was held, without negligence, for the loss of the passenger's money to a reasonable amount for expenses, retained in his stateroom. And in Pullman Pal Car Co. v. Gavin, 93 Tenn. 53; 42 Am. St. Rep. 902, the defendant was held liable for money stolen from a passenger's berth during the night by one of its porters. The court said: "It is however universally recognized by the courts, that it is the duty of a sleeping-car company to maintain a careful and continuous watch over the interior of the car while the berths are occupied by sleepers. If the property of the passenger is stolen by a fellow-passenger, or by an intruder on the train, in consequence of the failure of the company to

As to money in luggage there is a difference of opinion. Undoubtly the carrier would not be liable for large sums of money in luggage unless he was notified of it and accepted it, but if he understood and accepted it he would be liable for any amount. It has even been held that the acceptance of a large amount by the employee, in violation of the carrier's rule, would bind the carrier, if the passenger was ignorant of the rule.[1]

The carrier is bound for the safety of the baggage to the same point to which his contract binds him to carry the passenger.[2] If he tickets him to a point beyond the ter-

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maintain this careful and continuous watch, the company will be liable for its value, Carpenter v. New York, etc., R. Co., 124 N. Y. 53; 21 Am. St. Rep. 644. It follows as a corollary from this proposition, that if the servant or agent of the company, charged with the duty of watching and protecting the property of the guest, purloins it himself, the company is responsible." Such a company is responsible for the personal property of the passenger put into the hands of its employee on the car, as for example an overcoat. Pullman Pal. Car Co v. Lowe, 28 Neb. 239; 26 Am. St. Rep. 325.

[1] St. Louis S. W. Ry. Co. v. Berry, 60 Ark. 433; 28 L. R. A. 501. The court said: "We conclude that where a passenger, who is ignorant of the rules or instructions of railway companies forbidding their agents to receive money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount, if he accepts it to ship as baggage, and a loss occurs, the carrier's common-law liability will attach. We are aware that a different rule prevails in some of the States, notably Massachusetts. Blumantle v. Railroad Co., 127 Mass. 322; Alling v. Railroad Co., 126 Mass. 121; Jordon v. Railroad Co., 5 Cush. 69. See also Bomar v. Maxwell, 9 Humph. 620; Collins v. Railroad Co., 10 Cush. 506. But the weight of authority is with the rule as we have announced it. Railroad Co. v. Baldauf, 16 Pa. St. 67; Hutch. Car. § 685; Jacobs v. Tutt, 33 Fed. Rep. 412; Railroad Co. v. Fraloff, 100 U. S. 24; Humphreys v. Perry, 148 U. S. 627; Railway Co. v. Shepherd, 8 Exch. 30; Minter v. Railroad Co., 41 Mo. 503, and other cases cited in brief of counsel for appellee. While most of these cases have reference to merchandise in some form, yet the rationale of the doctrine, as to it, is equally applicable to money where it is carried as baggage."

[2] Stimson v. Conn. R. Co., 98 Mass. 83; 93 Am. Dec. 140.

minus of his own route, and especially if he also checks the baggage to such a point, he is responsible for the safety of the baggage to that point[1] The mere delivery of a through-check without a corresponding ticket does not make the carrier responsible for the baggage beyond his own route.[2] The sale of a through ticket does not render the second liable for the loss by the first,[3] and checking baggage through does not by itself make the last carrier liable for the negligence of a former.[3] An intermediate carrier need not show that the baggage was delivered by him in good order to the last carrier.[4]

In the absence of a through-contract, the carrier in fault is alone chargeable.[5]

The carrier cannot avoid nor limit his responsibility for baggage by mere notice upon tickets or checks, or other advertisement.[6] But if the passenger's attention is drawn to the limitation, or he is aware of it, and assents to it, the limitation becomes operative when contained in the

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[1] Louisville & Nash. R. Co. v Weaver, 9 Lea, 38; 42 Am. Rep. 654; Wolff v. Cent R. Co., 68 Ga. 653, 45 Am. Rep. 501; Balt. & Ohio R. Co. v. Campbell, 36 Ohio St. 647; 38 Am. Rep. 617; Isaacson v. N. Y. Cent. etc., R. Co., 94 N Y. 278, 46 Am. Rep. 142, Hawley v. Screven, 62 Ga. 347, 35 Am. Rep. 126, Cent R. v. Combs, 70 Ga. 533, 48 Am. Rep. 582; Coward v. East T. & C. R. Co., 16 Lea, 225; 57 Am. Rep. 226. But in Chicago, etc., R. Co. v. Fahey, 52 Ill. 81; 4 Am. Rep. 587, it was held that the carrier at fault was alone chargeable

[2] Felder v. Columbia, etc., R. Co., 21 S. C. 35; 53 Am. Rep. 656.

[3] Atchison, etc., Ry. Co. v. Roach, 35 Kans. 740; 57 Am. Rep. 199; Lowenburg v. Jones, 56 Miss. 688; 31 Am. Rep. 379.

[4] Montgomery, etc., Ry. Co v. Culver, 75 Ala 578; 51 Am. Rep. 483.

[5] Cincinnati, etc., R. Co. v. Pontius, 19 Ohio St. 221.

[6] Blossom v. Dodd, 43 N. Y. 264; 3 Am. Rep. 701; Rawson v. Penn. R. Co., 48 N. Y. 212; 8 Am. Rep. 543; Balt. & Ohio R. Co. v. Campbell, 36 Ohio St. 647; 38 Am. Rep. 617; Coward v. East T., etc., R. Co., 16 Lea, 225, 57 Am. Rep. 226; Kansas City, etc., R. Co. v. Rodebaugh, 38 Kans. 45; 5 Am. St. Rep. 715. Pennsylvania holds the contrary, Laing v. Colder, 8 Pa. St. 479; 49 Am. Dec. 533.

ticket.[1] Ordinarily the assent is not presumed, but the carrier is bound to show it,[2] but in some jurisdictions assent is presumed, in the absence of fraud, concealment or improper practice, by the acceptance of the ticket without objection.[3]

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[1] Rawson v Penn. R. Co., 48 N. Y 212; 8 Am. Rep. 543.

[2] Balt., etc , R. Co. v. Campbell, 36 Ohio St. 647; 38 Am. Rep. 617; Henderson v Stevenson, 2 H. L. 470 (s. c. Abb.); Mauritz v. N. Y., etc., R. Co., 23 Fed Rep. 765; Railroad Co. v. Lockwood, 28 Ohio St. 358; Railroad Co. v. Stevens, 95 U. S. 655.

[3] Steers v Liverpool, etc., S. Co., 57 N. Y. 1; 15 Am. Rep. 453. In O'Regan v. Cunard St Co., 160 Mass. 356, 39 Am. St. Rep. 484, it was even held that one accepting a ticket from a carrier is bound by its conditions, although she did not and could not read it. "It was her duty to ascertain the contents if she cared to know her rights." It seems impossible to formulate any general and explicit rule on this subject, so variant are the decisions. Some of the cases distinguish between land and ocean travel, and between conditions on the back and those on the face of the ticket, and some leave the question of the passenger's assent to the jury. Mr. Hutchinson makes no distinction between such contracts and those of the carriage of goods alone. He says (Carr. § 568): "So far as such tickets contain conditions in reference to the baggage of the passenger, as they sometimes do, there is no distinction between them and the ordinary receipts for goods when bailed for carriage;" citing Wilton v. St. Nav. Co., 10 C. B. [N. S.] 453, where a condition in an ocean steamer ticket exempting the owners from responsibility for baggage unless a bill of lading had been signed therefor, was held to protect him where the vessel had been wrecked by the negligence of the captain, although the passenger had not observed the condition. On the other hand, Mr. Lawson says (Cont. of Carrier, p. 122): "The conclusions to be drawn from these cases are, that a ticket is a mere voucher of payment; that there must be notice to the passenger of any condition it may contain at or before the completion of the contract; that it is immaterial whether a condition limiting the carrier's liability is contained on the face or the back of the ticket; unless the passenger has read or unless his attention has been called to it before the completion of the contract, and that from the bare possession of the ticket constructive knowledge of its conditions cannot be presumed." I prefer the latter view of the law both on principle and on authority. There is a manifest difference between the contract for carriage of goods alone and that for baggage, inasmuch as in the former case the owner has leisure to scrutinize the contract, and opportunity to withdraw his goods if he finds it objectionable;

Where the carrier receives baggage on deposit with a view to carriage, he may impose reasonable limitations on his liability in a receipt therefor, which bind the depositor by acceptance of the receipt without objection.[1]

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whereas, in the latter, he has no such leisure nor opportunity, at least in the case of railroad carriage, and is at the mercy of the carrier, having purchased his ticket. There may be a just distinction in this respect between carriers by land and carriers by water. Thus it is held in Wheeler v. Oceanic S. Nav. Co., 72 Hun, 5, that where a passenger on a steamship procures a ticket the day before sailing, he is bound by its conditions, although his baggage is on board, unless he demands its return. This distinction is approved in Zimmer v. N. Y. etc., R. Co., 137 N. Y. 460, where the court observe: "Cases where parties, proposing to have articles of property transported by a common carrier, deliberately enter into some necessary contract relating to the transportation, differ materially from those cases of travellers who commit their trunks, or articles of baggage, to an agent of some express or transfer company, and receive at the moment some paper, which as it has been said amounts simply to a voucher enabling them to follow and identify their property. Madan v. Sherard, 73 N. Y. 329. The difference is very obvious in the circumstances, which in the one case usually admit of no negotiation or discussion, while in the other the shipment of the property is a matter of arrangement, with full opportunity for deliberate action." Citing and approving Grossman v. Dodd, 63 Hun, 324 (baggage express company's receipt). The views expressed in Henderson v. Stevenson, *supra*, seem quite consonant with reason, although in that case stress was laid on the fact that the limitations were on the back of the ticket. But to my mind, the conclusive test of the situation is, that having bought his ticket, ordinarily the carrier does not hand it over till payment, and the passenger cannot demand that the carrier shall give him back his money if he finds unjust conditions in the ticket. In Brown v. East R. Co., 11 Cush. 97, the question of the passenger's assent was deemed one for the jury. See note, 5 Am. St. Rep. 720. A limitation on a sleeping-car ticket issued with the passage ticket is of no avail. Louisville, etc., R. Co. v. Katzenberger, 16 Lea, 380; 57 Am. Rep. 232. See Potter v. The Majestic, etc., Co, 60 Fed. Rep. 625; 23 L. R. A. 746 (U S. Cir. Ct. App.), where the main authorities are carefully reviewed, and it is held that although a limitation as to the *amount* of the carrier's liability for baggage may be imposed by a condition on the back of the ticket, where the words "See back" are conspicuously printed on its face, yet that an exemption from liability for loss or injury to the passenger or his luggage by perils of the sea or negligence in navigation may not thus be imposed.

[1] Harris v. Gt. W. Ry. Co, 1 Q. B. Div. 515.

The carrier may impose a charge for carrying baggage beyond a reasonable value, or weight, or number, or size of pieces.[1]

On the arrival of the baggage at the destination, the carrier must afford the passenger a reasonable time and opportunity to take it, during which he continues to be liable as insurer,[2] but after this he is responsible only as a warehouseman.[3]

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[1] Williams v. Gt. W. Ry. Co., 10 Ex. 15; Steers v. Liverpool, etc., Co., *supra;* Railroad Co. v. Fraloff, 100 U. S. 24.

[2] Mote v. Chicago, etc., R. Co., 27 Iowa, 22; 1 Am. Rep. 212; Chicago, etc., R. Co. v. Boyce, 73 Ill. 510; 24 Am. Rep. 268, and note, 272; Burnell v. N. Y. Cent., etc., R. Co., 45 N. Y. 184; 6 Am. Rep. 61; Toledo, etc., R. Co. v. Hammond, 33 Ind. 379; 5 Am. Rep. 221.

[3] *Ibid.;* Fairfax v. N. Y. Cent., etc., R. Co., 73 N. Y. 167; 29 Am. Rep. 119; Hœger v. Chicago, etc., Ry. Co., 63 Wis. 100; 53 Am. Rep. 271; Laffrey v. Grummond, 74 Mich. 186; 16 Am. St. Rep. 624.

CHAPTER XXII.

CARRIERS — PRESUMPTIONS AND BURDEN OF PROOF; REMEDIES; DAMAGES — CONFLICT OF LAWS.

Presumptions.—There are a few presumptions peculiar to the law of carriers that should be noted. The first and most important of these is the *prima facie* presumption of negligence, on the part of the carrier, which is raised by the occurrence of an accident resulting in personal injury. This attaches in every case of accident which is not manifestly the result of causes against which care, skill, diligence and foresight could not have availed. It attaches in every case of breakage or failure of any part of the vehicle; where a train leaves its track, or a stage overturns, or a boiler explodes, or there is a collision between vehicles; where there is an injury by reason of defect in the carrier's premises, or roadway, or appliances; in short, wherever it is not clear, upon the face of the occurrence, that he could not have been to blame. In all such cases, the burden is on the carrier to explain away his apparent negligence.[1]

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[1] Farish v. Reigle, 11 Gratt. 697; 62 Am. Dec. 666; Sanderson v. Frazier, 8 Colo. 79; 54 Am. Rep. 544; Smith v. St. Paul C. Ry. Co. 32 Minn. 1; 50 Am. Rep. 550, and note, 553; Seybolt v. N.Y., etc., R. Co., 95 N. Y. 562; 47 Am. Rep. 75; Feital v. Middlesex R. Co., 109 Mass. 398; 12 Am. Rep. 720; Memphis, etc., Co. v. McCool, 83 Ind. 392; 43 Am. Rep. 71; Phila., etc., R. Co. v. Anderson, 94 Pa. St. 351; 39 Am. Rep. 787; Eagle Packet Co. v. De Fries, 94 Ill. 598; 34 Am. Rep. 245; Ryan v. Gilmer, 2 Mont. 517; Iron Ry. Co. v. Mowery, 36 Ohio St. 418; 38 Am. Rep. 597; Lawrence v. Green, 70 Cal. 417; 59 Am. Rep. 428; Dougherty v. Mo. R. Co., 81 Mo. 325; 51 Am. Rep. 239; Louisville, etc., R. Co. v. Snyder, 117 Ind. 435; 10 Am. St. Rep. 60; Spellman v. Lincoln R. Co., 36 Neb. 890; 20 L. R. A. 316; Doyle v. Chicago, etc., R. Co., 77 Ia. 607; 4 L. R. A. 420; Stokes v. Saltonstall, 13 Pet. 181. See notes, 15 L. R. A., p. 35, etc.

There is no presumption that the passenger was acting carelessly or in bad faith.[1]

The like presumption attaches where goods are lost or delivered in a damaged condition.[2] In the case of connecting carriers of goods there is conflict of decision as to the presumption. Some cases hold that where goods pass over a line of several carriers, and are injured in transit, the jury, in the absence of direct proof to the contrary, may presume that they reached the last carrier in the same condition as when delivered to the first.[3] On the other hand, it has been held that where one of a continuous line of carriers is sued for injuries to goods intrusted to him for carriage, there is no presumption that he received them in good order, but the fact must be affirmatively shown by the plaintiff.[4]

In the case of an ordinary contract of carriage of common inanimate property, and the failure to deliver it or the delivery of it in a damaged condition, the burden is on the carrier to free himself from blame.[5] But in the

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[1] Louisville, etc., R. Co. v. Thompson, 107 Ind. 442; 57 Am. Rep. 120.

[2] Merch. D. T. Co. v. Bloch Bros., 86 Tenn. 392; 6 Am. St. Rep. 847; Mobile, etc., R. Co. v. Tupelo, etc., Co., 67 Miss. 35; 19 Am. St. Rep. 262; Browning v. Goodrich Trans. Co., 78 Wis. 391; 10 L. R. A. 415; 23 Am. St. Rep. 414; not so of loss of live stock where the owner agreed to care for it in transit and load and unload it at his own expense. Terre Haute, etc., R. Co. v. Sherwood, 132 Ind. 129; 17 L. R. A. 339; 32 Am. St. Rep. 239; and not so of loss of money by a passenger in a sleeping-car. Carpenter v. N. Y., etc., R. Co., 124 N. Y. 53; 11 L. R. A. 759; 21 Am. St. Rep. 644.

[3] Shriver v. Sioux City, etc., R. Co., 24 Minn. 506; 31 Am. Rep. 353; Mobile, etc., R. Co. v. Tupelo, etc., Co., 67 Miss. 35; 19 Am. St. Rep. 262; Beard & Sons v. Ill. Cent. Ry. Co., 79 Iowa, 518; 18 Am. St. Rep. 381; 7 L. R. A. 280; Smith v. N. Y. Cent. R. Co., 43 Barb. 225; 41 N.Y. 398; Laughlin v. Railway, 28 Wis. 204; 9 Am. Rep. 493; Dixon v. Richmond, etc., R. Co., 74 N. C. 538.

[4] Marquette, etc., R. Co. v. Kirkwood, 45 Mich. 51; 40 Am. Rep. 453. In the note, 40 Am. Rep. 457, it is said: "The principal case seems unsupported by authority."

[5] Hutch. Carr. § 768*a*.

like case of animals or perishable freight, and their delivery in a damaged condition, it has been held that the burden is not on the shipper to show that it did not come about through their inherent defects.[1] On the other hand, in the case of the death of animals transported wholly under the carrier's care, it has been held that the burden is on him to show that death resulted from some inherent property in the animal, without his fault.[2]

Where the contract of the carrier of goods stipulates for exemption in any particular, the question of presumption and of the burden of proof when he defends under such exemption is considerably vexed, with the weight of authority apparently in favor of the carrier.[3]

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[1] Penna. Railroad v. Raiordon, 119 Pa. St. 577; Hussey v. The Saragossa, 3 Woods, 380.

[2] Lindsley v. Railway, 36 Minn. 539; Louisville, etc., Railroad v. Wynn, 88 Tenn. 320

[3] Witting v. St. Louis, etc., Ry. Co., 101 Mo. 631; 20 Am. St. Rep. 636; 10 L. R. A. 602, favors the carrier, overruling former decisions of that court. The court said:

"Upon this question the authorities are in direct conflict. On the one hand it is held that when the common carrier relies upon a contract exemption, he must bring himself within the exemption, and that he does not do this by simply showing that the goods were lost, or destroyed, or injured by the excepted peril or accident, but that he must go further, and show that he was free from any negligence contributing to the loss or injury. The following are some of the cases which support this doctrine: Brown v. Adams Express Co., 15 W. Va. 812; Berry v. Cooper, 28 Ga. 543; Chicago, etc., R. Co. v. Moss, 60 Miss. 1003; 45 Am. Rep. 428; Graham v. Davis & Co., 4 Ohio St. 362; 62 Am. Dec. 285; Union Express Co. v. Graham, 26 Ohio St. 595. The same doctrine was asserted in this court in Levering v. Union Trans. & Ins. Co., 42 Mo. 88; 97 Am. Dec. 320, and in the subsequent case of Ketchum v. American, etc., Express Co., 52 Mo. 390. The question arose in the first of these cases on a bill of lading for the shipment of cotton containing the words 'at owner's risk of fire.' Judge Wagner, speaking for the court, said it devolved upon the defendant to show, notwithstanding the exception from liability stated in the contract, that the accident did not occur through any fault, want of care, or negligence on the part of defendant or its agents.

But where personal injury is apparently attributable to some exterior cause, against which the carrier could not

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"By the other line of authorities it is held to be sufficient for the carrier to show that the loss or damage was occasioned by some accident or peril, from liability for which he is exempted, either by his contract or the law; and that he is not required to go further, to show, in addition, that he was free from negligence contributing to the loss or damage. The following are some of the cases which assert this doctrine: Lamb v. Camden, etc., R & T. Co., 46 N. Y. 271; 7 Am. Rep. 327; Whitworth v. Erie Ry. Co., 87 N. Y. 413; Farnham v. Camden, etc., R. Co., 55 Pa. St. 53; Patterson v. Clyde, 67 Pa. St. 500; Little Rock, etc., R. Co. v. Talbot, 39 Ark. 526, Memphis, etc., R. Co. v. Reeves, 10 Wall. 176; Read v. St. Louis, etc., R. Co., 60 Mo. 199; Davis v. Wabash, etc., Ry. Co., 89 Mo. 340. Observations made in Wolf v. American Express Co., 43 Mo. 421; 97 Am. Dec. 406, are in line with the cases just cited, but the question of the burden of proof did not fairly arise in that case. It did however arise in the case of Read v. St. Louis, etc., R. Co., 60 Mo. 199. In that case the potatoes were shipped at owner's risk of freezing.

"It must therefore be taken as the established law of this State that when the cause of action stands on the ground of negligence on the part of the carrier, the burden of proof is upon the plaintiff. The authorities cited are not all agreed as to the ground upon which the rule stands. The true reason, it seems to us, is that negligence is a positive wrong, and will not be presumed, though it may be inferred from circumstances. Then the carrier brings himself within the exception, he need go no further to relieve himself from his liability as insurer. The party who founds his cause of action upon negligence must be prepared to establish the assertion by proof. If the cause of action stands on negligence of the carrier, and not on the common-law liability of the carrier as an insurer, the burden of proof is upon the plaintiff from the beginning to the end of the case. We do not see that there is anything so unreasonable in the rule as some courts seem to think, when we remember, that by common law, the common carrier is regarded as an insurer of the safety of the goods against all losses except such as are caused by the act of God or the public enemy. He may contract against this liability as an insurer, but he cannot contract against his negligence or that of his servants. Though the goods may be carried under a special contract relieving him from the liability of an insurer, still he is none the less a common carrier; and the question of negligence is to be determined in the light of the fact that he is a common carrier, and of the duties which he has assumed to perform. He is bound to use due care in the transportation of goods, regardless of any common-law liability as an insurer: N. Y. Cent. R.

have provided or guarded, he is not responsible although it occurred while the passenger was in transit.[1] This would embrace cases of apparent contributory neglect on the part of the passenger himself.

The same rule applies in the case of the carrier of goods.

If the injury is apparently by the act of God the burden is on the shipper to show negligence on his part.[2]

Remedies.—The real owner of goods lost or injured may maintain an action therefor, without regard to the parties

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Co. v. Lockwood, 17 Wall. 357; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174."

On the shipper's side are also Lindsley v. Chic., etc., Ry. Co., 36 Minn. 539; 1 Am. St. Rep. 692; Hull v. Chic., etc., Ry. Co., 41 Minn. 510; 16 Am. St. Rep. 722; and on that of the carrier, Lancaster Mills v. Merch. C. P. Co., 89 Tenn. 1; 24 Am. St. Rep. 586.

Mr. Hutchinson says that the rule putting the burden of proof on the carrier prevails "in Alabama, Georgia, Mississippi, Ohio, South Carolina, Texas and West Virginia, and certainly seems to be the better rule, and in accordance with reason and sound policy. It seems also to have been approved in Minnosota and Nebraska." Citing cases. The contrary view, he says, "prevails in the English, Arkansas, Kansas, Louisiana, Missouri, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, and the United States Courts, and seems to be supported by a preponderance of authority. It is also probably the rule in Iowa and Maine." Citing cases, and probably so in Connecticut and Illinois. Harper Bros. v. Railroad Co., 37 Conn. 272; Dunseth v. Wade, 2 Scam. 285.

[1] Penn. R. Co. v. MacKinney, 124 Pa. 462; 2 L. R. A. 820; 10 Am. St. Rep. 601 (missile hurled through car window); Thomas v. Phila., etc., R. Co., 148 Pa. St. 180; 15 L. R. A. 416; Hawkins v. Front St. C. R. Co., 3 Wash. 592; 16 L. R. A. 808 (collision between street car and wagon). [This last case seems of doubtful soundness, for it would seem that as the collision might have been by the fault of the railway company, the ordinary presumption attaches.] Fearn v. W. J. F. Co., 143 Pa. St. 122; 13 L. R. A. 366 (fall of snow on deck of boat).

[2] Long v. Penna. R. Co., 147 Pa. St. 343; 14 L. R. A. 741; 30 Am. St. Rep. 732 (unprecedented flood).

named as owners in the receipt or bill of lading.[1] Suit may also be maintained by one having possession and a special property.[2] The consignor may always maintain the action in absence of proof of ownership or interest in the consignee,[3] and so it has been held even if the consignee is the owner, provided the consignee has not sued.[4] This is on the theory of a breach of the agreement with the consignor to carry. But generally it seems that the right to sue is determined by the right of property.[5] If goods are shipped for account and at risk of consignee he alone can sue.[6] A carrier may sue a connecting carrier to whom he has delivered goods marked "C. O. D.," for delivering them to the consignee without payment.[7] The father may sue for loss of his minor daughter's clothing.[8]

Where a passenger is personally hurt, not only may he recover therefor, but any person to whom he owes service may maintain an action for the loss of service in consequence.[9]

In the case of connecting carriers the consignee may sue the carrier in whose hands the goods are lost.[10] But if the first carrier makes a through contract the consignee

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[1] Day v. Ridley, 16 Vt. 48; 42 Am. Dec. 489, and note; 38 Am. Dec. 423; Bassett v. Spofford, 45 N. Y. 387; 6 Am. Rep. 101.

[2] Mayall v. Boston, etc., R. Co., 19 N. H. 122; 49 Am. Dec. 149.

[3] Hand v. Baynes, 4 Whart. 204; 33 Am. Dec. 54.

[4] Finn v. W. R. Co., 112 Mass. 524; 17 Am. Rep. 128; Hooper v. Chic., etc., Ry. Co., 27 Wis. 81; 9 Am. Rep. 439.

[5] Thompson v. Fargo, 49 N. Y. 188; 10 Am. Rep. 342; Krudler v. Ellison, 47 N. Y. 36; 7 Am. Rep. 402; Ralph v. Chic., etc., Ry. Co., 32 Wis. 177; 14 Am. Rep. 725; South. Ex. Co. v. Craft, 49 Miss. 480; 19 Am. Rep. 4.

[6] Potter v. Lansing, 1 Johns. 215; 3 Am. Dec. 310.

[7] Murray v. Warner, 55 N. H. 546; 20 Am. Rep. 227.

[8] Baltimore S. P. Co. v. Smith, 23 Md. 402; 87 Am. Dec. 575; and the master for loss of his servant's livery, Meux v. Gt. E. Ry. Co., Q. B., Oct., 1895.

[9] Ames v. Union Ry. Co., 117 Mass. 541; 19 Am. Rep. 426 (master and injured apprentice).

[10] Packard v Taylor, 35 Ark. 402; 37 Am. Rep. 37.

may look to him in any event.[1] If there was no through contract or the last carrier limited his liability to his own line, the first carrier may be sued if the shipper cannot locate the loss.[2]

At common law, case is the proper form of action where goods were destroyed, lost or stolen, so that delivery could not be made,[3] and trover in case of refusal to deliver when delivery is possible, or has been made to a wrong person,[4] but loss by deviation constitutes a conversion and trover lies.[5] For loss by negligence the proper remedy is assumpsit or special action on the case.[6] Assumpsit will not lie for loss of baggage gratuitously carried.[7]

Under the Code system of procedure and pleading the action should be replevin, or for damages for the conversion, or for damages for the breach of contract to carry, or for damages for the injury by negligence, according to the circumstances.

In case of personal injury by negligence the action may be for the tort or for damages for the breach of the contract to carry.[8]

Damages.—The measure of damages in case of failure to deliver goods or delivery in damaged condition is in the one case the value of the goods at their destination at the proper time of delivery, and in the other the amount of

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[1] Newell v. Smith, 49 Vt. 255.

[2] Smith v. N. Y. Cent. R. Co. 43 Barb. 225; affirmed, 41 N. Y. 620; Laughlin v. Chic., etc., R. Co., 28 Wis. 204; 9 Am. Rep. 493, and other cases cited in note; 72 Am. Dec. 246, and cases *ante*, ref. 4, 5.

[3] Packard v. Getman, 4 Wend. 613; 21 Am. Dec. 166.

[4] Packard v. Getman, 6 Cow. 757; 16 Am. Dec. 475.

[5] Phillips v. Brigham, 26 Ga. 617; 71 Am. Dec. 227.

[6] Hawkins v. Hoffman, 6 Hill, 586; 41 Am. Dec. 767.

[7] Flint, etc., R. Co. v. Weir, 37 Mich. 111; 26 Am Rep. 499.

[8] Baltimore City, etc., Ry. Co. v. Kemp, 61 Md. 619; 48 Am. Rep. 134.

deterioration, without allowance for contingent profits on sales lost.[1]

In case of delay in delivery, depreciation in value, or the loss of certain profits, are recoverable; but contingent profits cannot enter into the recovery.[1]

In cases of personal injury of the passenger, the measure of damages is in conformity with that in ordinary cases of negligence, and the nearest practicable approach to a definite rule is that the damages must be for the natural consequences.[1]

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[1] Hadley v. Baxendale, 9 Exch. 341; 5 Eng. Rul. Cas. 502; Horne v. Midland Ry. Co., L. R. 8 C. P. 131, 5 Eng. Rul. Cas. 506. In a note to these cases, 5 Eng. Rul. Cas. 524, it is said: "That contingent profits from possible sales or employment of goods cannot enter into the recovery, although the carrier was informed at the time of the shipment that the object of the agreement was to make such sales, see Harvey v. Conn. R. Co., 124 Mass. 421; 26 Am. Rep. 673; and to this effect, Ward's, etc., Co. v. Elkins, 34 Mich. 439; 22 Am. Rep. 544; Ward v. N. Y. Cent. R. Co., 47 N. Y. 29; 7 Am. Rep. 405; Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356 (loss of tools of a dentist passenger); Mather v. Am. Ex. Co., 138 Mass. 55; 52 Am. Rep. 258 (loss of architect's plans, entailing delay). But in Deming v. Grand T. Ry. Co., 48 N. H. 455; 2 Am. Rep. 267, where the carrier was informed that the goods could be sold if forwarded at once, and he delayed, he was held for depreciation and loss of chance to sell. And similarly as to loss of use of machinery during its detention. Priestly v. North. Ind., etc, Ry. Co., 26 Ill. 205; 79 Am. Dec. 369. In the last case it was held that under proper notice, averments and proofs, special damage even beyond this might be recovered. Of this, Redfield says (Carriers, § 32): 'The difference between the last case and some of the preceding,' English, 'in regard to the rule of damages seems to be one of policy between the English and American courts, in the one case to enable the owner to realize speculative damages, and in the other to deny all but what is the most obvious actual damages.' Mr. Hutchinson favors the view that the measure of damages may be enhanced so as to cover contingent profits where the carrier agrees to transport within a given time or for a stated purpose (Carriers, § 772). Citing Vicksburg, etc., R. Co. v. Ragsdale, 46 Miss. 458, where the court did 'not deny the proposition that where the carrier is notified of the expected profits and contracts in view of them, he may be liable;' but the court in that case held that they must "be so definite and certain

The same rule is applied in cases of delay of the passenger. The natural inconvenience and loss will be considered, but not extraordinary expenses, such as a special train to shorten the consequent delay; nor contingent profits unless there was an express agreement or implied understanding having in view the business in question.[1]

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that they can be ascertained reasonably by calculation.' The editor of Am. & Eng. Ency. of Law (Carriers, p. 908), states that 'the loss of mere speculative profits, in consequence of the delay of the carrier, or his failure to deliver the goods, is not an element of damage. The recovery is limited to loss of profits on existing contracts.' Citing Ingledew v. North. R. Co., 7 Gray, 86 (loss of time); Penn. R. Co. v. Titusville R. R. Co., 71 Pa. St. 350 (increased expense of laying plank). Where a carrier negligently allows mules to escape, the expense of searching for them is recoverable. North. Mo. R. Co. v. Akers, 4 Kans. 453; 96 Am. Dec. 183. Ordinarily counsel fees are not recoverable. Richmond, etc,, R. Co. v. Benson, 86 Ga. 203; 22 Am. St. Rep. 446. The ordinary measure of damages is the value of the goods at the place of delivery, in case of loss, and the depreciation in case of damage, but in the case of a family portrait its value to the owner is the standard. Green v. Boston, etc., R. Co., 128 Mass. 221; 35 Am. Rep. 370. See Ward v. N. Y. Cent. R. Co., 47 N. Y. 29; 7 Am. Rep. 405; Ayres v. Chicago, etc., R. Co., 71 Wis. 372; 5 Am. St. Rep. 226. As to mares with foal, see Missouri Pac. R. Co. v. Fagan, 72 Tex. 127; 2 L. R. A. 75; 13 Am. St. Rep. 776. Where a woman miscarried by reason of an injury negligently inflicted on her, she was not allowed damages for the loss of the society or services of the child, nor for her grief in consequence. Tunnicliffe v. Bay, etc., Ry. Co., — Minnesota, —; 61 N. W. Rep. 11; Bovee v. Town of Danville, 53 Vt. 183. So also when the action was brought by the husband, Butler v. Manhattan Ry. Co., 143 N. Y. 417; 42 Am. St. Rep. 738.

[1] Hobbs v. London, etc., Ry. Co., L. R, 10 Q. B. 111; 5 Eng. Rul. Cas. 381; Le Blanche v. London, etc., Ry. Co., 1 C. P. Div. 286; 5 Eng. Rul. Cas. 392. In a note to these cases, 5 Eng. Rul. Cas. 428, it is said:

"In a leading New York case, Williams v. Vanderbilt, 28 N. Y. 217; 84 Am. Dec. 333, it was adjudged that the damages might include the value of time lost, and expenses incurred, embracing those of sickness arising from detention in an unhealthful climate (Isthmus of Panama). To the same effect, Van Buskirk v. Roberts, 31 N. Y. 661.

"In Cincinnati, etc., R. Co. v. Eaton, 94 Ind 474; 48 Am. Rep. 179, where the passenger was carried past her destination, it was held competent to show

Conflict of laws.—In the case of a contract between a carrier and a passenger or a shipper of goods, the intention of

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that she was compelled to walk three hours over dusty roads, got wet in crossing a creek, was chased by dogs and otherwise frightened, and that the weather was sultry, by means of which she was made sick. Citing the Hobbs case.

"In International Ry. Co. v Terry, 62 Tex. 380; 50 Am. Rep. 529, the company carried a passenger beyond his station, and put him off at a water-tank, in inclement weather, by means of which he contracted pneumonia. He recovered for consequent pain, expense, and business detriment. 'Much attention has been given to the case of Hobbs.'

"In Brown v. Chicago, etc., R. Co., 54 Wis. 342; 41 Am. Rep. 41, a pregnant woman was carelessly directed by the brakeman to leave the train three miles short of her destination. The walk brought on a miscarriage and the defendant was held liable therefor.

"In Murdock v. B. & A. R. Co., 133 Mass. 15; 43 Am. Rep. 480, where the conductor wrongfully refused a ticket, and arrested the plaintiff for evading his fare, and delivered him to officers at Pittsfield, it was held that his detention over night in a cell, and the discomforts and indignities therefrom, and from the authorities at Pittsfield, and a cold which he took by reason of the dampness of the cell, were not proper items of damage. Citing the Hobbs case.

"The circumstances in Indianapolis, etc., Ry. Co. v. Birney, 71 Ill. 391, were very similar to those in the Hobbs case, except that in the former, the plaintiff might have taken another train a few hours later, or a horse and carriage, and the opinion in the Illinois case is based on the ground that the exposure was voluntary and unnecessary. See Georgia, etc., R. Co. v. Eisken, 86 Ga. 641; 22 Am. St. Rep. 490.

"In Francis v. St. Louis T. Co., 5 Mo. App. 7, a passenger carrier contracted to carry a young lady from a station to her home, in a city, but set her down a mile from her residence, on a sidewalk of a frequented street, along which ran tram cars going within a square of her house. The day was cold but dry; the woman was delicate but not ill; being warmly clad she walked home with a friend, and in so doing took a cold which permanently injured her. Held, too remote to warrant a recovery.

"In Houston, etc., Ry. Co. v. Hill, 63 Tex. 381; 51 Am. Rep. 642, the company contracted with the plaintiff to carry excursionists to a certain place to attend a public entertainment. On a breach of the contract it was held that the plaintiff might recover the profits which he would have realized on sales of tickets actually made, and the difference in expense of transportation of those whom he

the parties will govern as to the law of place to be applied in its construction, and in the absence of a clear expression

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had thus agreed to take and did take on the faith of the contract, but nothing for profits of conjectural sales.

"In Georgia Railroad v. Hayden, 71 Ga. 581; 51 Am. Rep. 274, by a collision, the plaintiff, a theatrical manager, who was a passenger with his troupe, was prevented from reaching his destination in time to fulfill an advertised engagement, for which tickets had been sold, and he had to refund the money. Held, that he could not recover that amount. 'Damages which depend upon the particular character or business of one of the parties cannot be recovered unless known to the other party at the time of entering into the contract.'

"The loss of a job by delay at a station at which a passenger was wrongfully put off is too remote to be considered. Carsten v. No. P. R. Co., 44 Minn. 454; 9 L. R. A. 688.

"Damages for refusal to allow the plaintiff to take a train which he was entitled to take, include the amount paid for another ticket, loss of time, necessary hotel expenses, and other actual inconveniences. Northern C. R. Co. v. O'Conner, 76 Md. 207; 16 L. R. A. 449.

"See Louisville, etc., R. Co. v. Ballard, 88 Ky. 159; 2 L. R. A. 694; Chattanooga, etc., Ry. Co. v. Lyon, 89 Ga. 16; 15 L. R. A. 857.

"In an action upon a guaranty of a railroad company to transport an opera troup to a certain destination by a specified time, the loss from failure to arrive in season to give performances which the company knew the troup were going to such destination to give is recoverable; but not so of loss from the breaking up of the troup through failure to pay the performers owing to the want of the expected receipts from such advertised performances. Foster v. Cleveland, etc., R. Co., 56 Fed. Rep. 434.

"Judge Thompson says of the Hobbs case (Carriers of Passengers, 566): 'The rule seems to have been applied with unnecessary vigor.'"

Where a travelling salesman received as compensation a certain salary, his railroad expenses, and a certain percentage of the amount of his sales, the latter were held not to be profits for which was debarred from recovery in an action for personal injuries, and he was allowed to show the extent and amount of his ordinary business.

A passenger was allowed to recover for bodily suffering caused by being compelled to walk back to his destination after being negligently carried beyond it; Mobile, etc., R. Co. v. McArthur, 43 Miss. 180; for sickness and suffering caused by failing to stop at regular advertised landing place and being left all night exposed to the weather; Heirn v. McCaughan, 32 Miss. 17; for an injury

to the contrary the law of the place where it is made will be deemed to govern its construction. This is so as to contracts for passage or carriage of goods from one State to another, and from one foreign port to another.[1] So if a stipulation in a contract relieving a carrier from liability for injuries to passengers by the negligence of its servants is valid by the law of the place where it is made, it will be enforced where the contract is sued upon, although the law of that place is different.[2]

In respect to negligence producing injury to cargo occurring within foreign territory, the law of that territory must prevail.[3]

There can be no recovery in one State for injuries sustained in another, unless the infliction of the injuries is

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sustained in returning to a station after a wrongful ejection; Evans v. Ry. Co., 11 Mo. App. 463; for suffering from a cold contracted by being forced to wait for a delayed train in a station which was not warmed; Texas, etc., Ry. Co. v. Mayes, Tex. Sup. Ct.; 15 S. W. Rep. 43.

[1] Lloyd v. Guibert, L. R., 1 Q. B. 115; 5 Eng. Rul. Cas. 870 (holding that in the circumstances the law of the ship's flag governed); Liverpool, etc., S. Co. v. Phœnix Ins. Co., 129 U. S. 397, and cases cited therein; China Mut. Ins. Co. v. Force, 142 N. Y. 90; Talbott v. Merch. D. T. Co., 41 Iowa, 247; 20 Am. Rep. 580; West., etc., R. Co. v. Exposition C. Mills, 81 Ga. 522; 2 L. R. A. 102; Potter v. The Majestic, etc., Co., 60 Fed. Rep. 625; 23 L. R. A. 746. The doctrine as stated in the text was approved in the last case, although there the contract expressly provided that it should be governed by English law. Pope v. Nickerson, 3 Story, 465, is disinguished in Steamship Co. v. Insurance Co., *supra*. The validity of a clause in a bill of lading exempting a ship owner from damages due to a latent defect is to be determined by English law, where the ship is English and the contract was signed in an English port. The Carib Prince, 63 Fed. Rep. 266. A State statute making it unlawful for a carrier to limit his common-law liability to deliver property received for transportation will not control a contract made in another State contemplating a through carriage to a third State, although the carrier is incorporated in the first State. Thomas v. Wabash, St. L. & P. R. Co., 63 Fed. Rep. 200.

[2] O'Regan v. Cunard S. Co., 160 Mass. 356; 39 Am. St. Rep. 484. But see The Guildhall, 58 Fed. Rep. 796.

[3] Baetjer v. La Compagnie, etc., 59 Fed. Rep. 789.

actionable under the law of the State in which they were received; but if actionable in the State where inflicted, it will be actionable in another State unless contrary to its policy, although it would not be actionable if it had been inflicted there.[1]

The same is true of negligence producing the death of a human being.[2]

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[1] Alabama, etc., R. Co. v. Carroll, 97 Ala. 126; 38 Am. St. Rep. 163; 18 L. R. A. 433 (case of master and servant), and cases cited; Walsh v. N. Y., etc., Ry. Co., 160 Mass. 571; 39 Am. St. Rep. 514.

[2] Davis v. N. Y., etc., R. Co., 143 Mass. 301; 58 Am. Rep. 138, and note, 143. See Usher v. West. J. R. Co., 126 Pa. St. 206; 12 Am. St. Rep. 863, note; 14 Am. St. Rep. 353; Higgins v. Cent., etc., R. Co., 155 Mass. 176; 31 Am. St. Rep. 544.

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